No. 7745

United States
Circuit Court of Appeals
For the Ninth Circuit

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a Corporation,

Appellant,

vs.

LEO H. MARTIN,

Appellee.

Transcript of Record

Upon Appeal From the United States District Court for the Western District of Washington, Southern Division.

The Recorder Ptg. & Pub. Co., 460 Fourth St., S. F.

No. 7745

United States
Circuit Court of Appeals
For the Ninth Circuit

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a Corporation,

Appellant,

vs.

LEO H. MARTIN,

Appellee.

Transcript of Record

Upon Appeal From the United States District Court for the Western District of Washington, Southern Division.

The Recorder Ptg. & Pub. Co., 460 Fourth St., S. F.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

COUNSEL OF RECORD:

For Plaintiff and Appellee:

WILLIAM P. LORD,
Spalding Building,
Portland, Oregon.

HARRY ELWOOD FOSTER,
Olympia, Washington.

For Defendant and Appellant:

CAREY, HART, SPENCER and McCULLOCH,
No. 1410 Yeon Building,
Portland, Oregon.

In the District Court of the United States For
The Western District of Washington
Southern Division

8354

LEO H. MARTIN,

Plaintiff

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a corporation,

Defendant.

COMPLAINT

For cause of action against defendant, plaintiff alleges:

I.

That during all the times herein mentioned defendant was and it now is a corporation, organized under the laws of the State of Washington, and during all of said times was engaged as a common carrier of passengers and freight by railroad for hire between the States of Oregon and Washington.

II.

That on the 21st and 22d days of April, 1932, and prior thereto, defendant was the owner of a certain railroad locomotive, No. 623, which was used on said days and prior thereto in the transportation of passengers and freight on a train being operated by defendant on a regular run between the cities of Portland, Oregon, and Spokane, Washington, and return, and on the 22d day of

April, 1932, said locomotive had just completed a trip between said cities and had transported passengers and freight for hire between said states, and had been taken into a roundhouse in the plant operated by defendant in the city of Vancouver, Washington, and said locomotive was being inspected before making the next run in such interstate commerce, which would occur within a few hours, when it was discovered by an inspector that the flanges on certain trailer [1*] wheels on said locomotive was worn and required to be repaired, so as to enable said locomotive to be used in interstate commerce for the transportation of said train on the aforementioned regular run.

III.

That during all the times herein mentioned defendant owned and operated railroad yards, engine roundhouses, machine shop and repair shop in said city of Vancouver; that certain railroad tracks ran between the roundhouse and machine and repair shops, and the said roundhouse and machine shop were also connected by certain decking, which was about 250 feet between the roundhouse and the machine shop; that railroad tracks in said roundhouse also connected with a turntable in defendant's plant, and said turntable connected with tracks which ran into defendant's said machine shops; that on said day the said decking had become worn and decayed, so that there were de-

*Page numbering appearing at the foot of page of original certified Transcript of Record.

pressions in said decking, and the decking was rough and uneven, and knots were sticking up, and work trucks being hauled or pushed over said decking would become caught in said depressions and on knots or, owing to the decayed stringers and decking, would sink through the said decking; that there were two railroad tracks leading into the said machine shop and passing through said decking, and the planks of said decking over which track No. 3 ran were about even with the tops of the rails, and defendant had caused the ends of the planks next to the rails to be hewn or beveled off so that there was an incline on said decking running towards the said rail, all of which was well known to defendant and to defendant's foreman hereinafter mentioned, long prior to said day.

IV.

That during all the times herein mentioned plaintiff was employed by defendant as an engine wiper and to perform other duties assigned to plaintiff by one William Morrison, a foreman in [2] the employ of defendant at said Vancouver plant, and plaintiff was bound to and did obey the orders and directions given him by said foreman in the performance of his duties.

V.

That during all the times herein mentioned defendant used a certain skeleton truck to haul locomotive engine trailer wheels in and about its said plant; that said truck traveled on small wheels and

a channel iron about 12 inches in width was set between the two sets of wheels of the truck, and a slot was cut in one side of the channel iron so as to permit the wheels to roll into said channel iron, and the side of the flange of the wheel to rest on the end of the channel iron on the opposite side of the slot; that said channel iron was made fast to the axles of the truck and acted as a bed to form an ordinary dolly or truck; that the said truck was between six and seven feet in length and was between ten and twelve inches in width, and the axles were designed to travel about three inches above the decking, but on said day and for some time prior thereto the said truck was sprung so that one side thereof did not ride above the decking more than half an inch, which fact was well known to defendant and to defendant's said foreman prior to said 22d day of April 1932, and subsequent thereto; that said truck had a tongue with a loop for a handle. That said trailer wheels weighed upward of 4,000 pounds and said wheels are connected by a journal and are about four feet eight inches apart, and when said trailer wheels were placed on the truck the same sat endwise.

VI.

That by reason of the facts herein alleged the said truck, in being hauled across the said decking, would become caught or "hung up" in the depressions and uneven places in said decking. [3]

VII.

That on said day the aforesaid trailer wheels

were removed from said locomotive and were set endwise on said hereinbefore described skeleton truck, and said trailer wheels were to be transported thereon from said place in said roundhouse, across the aforementioned decking into defendant's said machine shop; that the pulling of said truck so loaded across said decking was under the direction of defendant's said foreman, and said foreman directed that plaintiff assist in said work, and it required the services of six or seven other employees of defendant in its said plant to pull and push said truck across said decking; that after said trailer wheels had been removed from said locomotive and placed on said truck, plaintiff was directed by said foreman to take a place inside the two wheels and push against the forward wheel, and other employees were directed to pull on the tongue, and others pushed on the rear; that in the course of pushing said truck over said decking, when the said truck arrived at a point near the track leading to the machine shop, which plaintiff believes to be known to defendant as track No. 3, the forward end of said truck became "hung up" in a depression in said decking, and immediately in front of the depression where said truck became hung up as alleged, the planking was hewn or beveled off as described.

VIII.

That thereupon defendant's said foreman directed that plaintiff secure a crowbar, and that another employee procure a pinchbar, and the said foreman

directed that plaintiff stand in a position between the trailer wheels and in close proximity to the journal, and to insert said crowbar under the forward trailer wheel which extended beyond the sides of the channel [4] iron, and to lift up on the same; that without any notice to plaintiff and without knowledge on plaintiff's part, defendant's said foreman had in the meantime directed that an employee pushing in the rear and who had secured a pinchbar, place the same under the rear end of the channel iron and to lift up on the same, and the said employee, prior to the time plaintiff lifted up on the said crowbar, had already lifted up on the rear end of the said trailer wheels with said pinchbar, and when plaintiff lifted up the forward trailer wheel with said crowbar, the said truck was raised above the depression in said decking and suddenly and with great force pushed forward down said incline, and the rear trailer wheel caught the heel of plaintiff's right foot, thereby causing plaintiff to sustain the injuries and damages hereinafter set forth.

IX.

That a practicable method of transporting said trailer wheels from the roundhouse to the machine shop was to place the same on the track leading from the roundhouse to the machine shop, and to roll the same on said truck into said machine shop and/or to place the same on the track leading to the turntable and to push the same onto the turntable and then turn the turntable track to connect

with the track leading into the machine shop and push the same into the machine shop.

X.

That the defendant by its employee was negligent and careless proximately causing the injuries to plaintiff, in the following particulars:

(1) that the method adopted by defendant's said foreman in transporting said trailer wheels by means of said truck across said decking was not a reasonably safe method of performing the work for the reason of the condition of said decking and the sprung [5] condition of said truck, as hereinbefore described;

(2) that after having undertaken to transport the said trailer wheels across the decking in the manner alleged, and the said truck having become caught in said depression, the defendant's said foreman should have directed four men to take crowbars or pinchbars and to place the ends of said crowbars two at the side on the forward end of the truck, and two other men with crowbars at the rear of said truck to pry on the rear end of said truck, and two men to hold the tongue of said truck for the purpose of guiding the truck, and then upon a signal given by said foreman all hands to lift and pry in unison;

(3) that defendant was further negligent and careless in maintaining said uneven and worn-out decking, and in using and operating a truck the side of which was sprung as aforesaid;

(4) that defendant's said foreman, after hav-

ing adopted the method of pushing said truck over said depression in the manner described, should have warned plaintiff of the danger of said truck slipping forward down said incline and should not have directed plaintiff to work in the position described.

XI.

That when the aforesaid trailer wheel caught plaintiff's right foot plaintiff sustained a spraining of the right sacro-iliac synchondrosis and a divulsion of the right sacro-iliac and the right symphysis pubis, all of which causes plaintiff great physical pain and permanent injury to his back and spine and the sacro-iliac and pelvic regions, causing plaintiff to become nervous and unable to sleep at night, and to suffer continual pain, and to be unable to follow his vocation as a machinist's helper, all to plaintiff's damage in the sum of Fifty Thousand Dollars ($50,000.00). [6]

WHEREFORE plaintiff prays for judgment against defendant for the sum of Fifty Thousand Dollars ($50,000.00) and for his costs and disbursements incurred herein.

WM. P. LORD
Attorney for Plaintiff [7]

State of Oregon
County of Multnomah—ss.

I, LEO H. MARTIN, being first duly sworn, on oath say: I am the plaintiff named in the above

entitled cause; I know the contents of the foregoing Complaint and believe the same to be true.

LEO H. MARTIN

Subscribed and sworn to before me this 28th day of March, 1934.

(Seal) MARIE BENNETT
Notary Public for Oregon
My commission expires

[Endorsed]: Filed April 2, 1934. [8]

[Title of Court and Cause.]

AMENDED ANSWER

Defendant makes this its answer to the complaint of plaintiff in the above entitled action:

I.

Defendant admits the allegations of paragraph I of the complaint relating to the organization and business of defendant.

II.

Defendant admits that on the 21st and 22nd days of April, 1932, and prior thereto, defendant was the owner of a certain railroad locomotive which had theretofore been used for the transportation of passengers and property by a scheduled train between the cities of Portland, Oregon, and Spokane, Washington; that after the completion of the last service of said locomotive in the movement of trains said locomotive was placed in defendant's

roundhouse in the City of Vancouver, Washington; that included in the work which was done on said locomotive while so placed in the roundhouse was the removal of said wheels and the making of certain repairs on said wheels, as alleged in paragraph II of the complaint; but except as so admitted defendant denies the allegations of said paragraph II. [9]

III.

Defendant admits that at the times referred to in the complaint defendant owned and operated railroad yards, a roundhouse and repair shops in Vancouver, Washington; that at the roundhouse was a turntable; that certain portions of the floor of defendant's roundhouse were covered by plank flooring, as alleged in paragraph III of the complaint; but except as so admitted defendant denies the allegations of said paragraph III.

IV.

Defendant admits that at the times referred to in the complaint plaintiff was employed at defendant's roundhouse and that William Morrison was a foreman in defendant's employ at said roundhouse, as alleged in paragraph IV of the complaint; but except as so admitted defendant denies the allegations of said paragraph IV.

V.

Defendant admits that at its roundhouse and shops in Vancouver it owned and used a certain truck designed for carrying engine trailer wheels,

and said truck was so designed to facilitate the loading and transportation of engine trailer wheels; that engine trailer wheels of the type being moved at the time of the accident referred to in the complaint weighed over 3000 pounds and were connected by an axle and were approximately four feet and eight inches apart on said axle, all as alleged in paragraph V of the complaint; but except as so admitted defendant denies the allegations of said paragraph V.

VI.

Defendant denies the allegations of paragraph VI of the complaint. [10]

VII.

Defendant admits that at the time referred to in the complaint certain trailer wheels were loaded upon said truck and were being transported in said roundhouse; that several employees of defendant were engaged in transporting said wheels; that plaintiff was a member of the crew at said time and place transporting said wheels; and that during the process of transporting said wheels the movement of said truck was interrupted, all as alleged in paragraph VII of the complaint; but except as so admitted defendant denies the allegations of said paragraph VII.

VIII.

Defendant denies the allegations of paragraph VIII of the complaint.

IX.

Defendant denies the allegations of paragraph IX of the complaint.

X.

Defendant denies the allegations of paragraph X of the complaint.

XI.

Defendant denies the allegations of paragraph XI of the complaint.

For a first further and separate answer and defense defendant alleges that the acts of the plaintiff at the time and place referred to in the complaint were negligent, in that plaintiff in performing his duties of assisting in moving said wheels, and particularly in using a bar, knowingly and unnecessarily placed himself in a dangerous position at a time when [11] plaintiff knew that said wheels were to be moved, and that said negligent acts of plaintiff caused or contributed to cause the injuries, if any, sustained by plaintiff at said time and place.

For a second further and separate answer and defense defendant alleges that at said time and place when plaintiff sustained injuries, if any, of which he now complains, plaintiff assumed the risk of such injuries, in that the dangers incident to the movement of said wheels and the use of the bar in the manner adopted by plaintiff, were open and apparent and were known and appreciated by plaintiff or should have been known and appreciated

by plaintiff if plaintiff had used his ordinary powers of observation, and that the risks thus assumed by plaintiff caused or contributed to cause the injuries, if any, of which plaintiff now complains.

For a third further and separate answer and defense defendant alleges that this court has no jurisdiction to hear and consider the cause of action set forth in the complaint, for the reason that there is no diversity of citizenship, since plaintiff is a resident of the State of Washington and defendant is a corporation organized under the laws of the State of Washington and is a resident of the State of Washington, that this action does not arise under the laws of the United States, and that there is no other ground whereby this court has or can acquire jurisdiction; and, in particular, that plaintiff, at the time and place of his alleged injuries, was not engaged in interstate commerce and that the Act of Congress relating to injuries to railroad employees while engaged in interstate commerce, known as the Federal Employers' Liability Act, is [12] not applicable in the present case, but that, on the other hand, plaintiff was engaged in the repair of a locomotive which, although it had theretofore been used in interstate commerce, had been withdrawn by defendant from interstate commerce and was then being held in defendant's roundhouse for extensive repairs.

For a fourth further and separate answer and defense, defendant alleges that:

Plaintiff heretofore brought and prosecuted an action in the Superior Court of the State of Washington in and for Clark County, wherein he was plaintiff and the defendant herein was defendant, and wherein plaintiff sought to recover from defendant damages upon the same cause of action as is attempted to be set forth in the complaint herein. Defendant appeared and answered in the said suit and in said answer defendant set forth, as a separate defense, that plaintiff was not entitled to recover because the injuries alleged to have been sustained by plaintiff were the result of risks of plaintiff's employment, which risks were assumed by plaintiff. Plaintiff thereafter filed his reply to said answer, denying the allegations of said further defense. Thereafter, upon the issues made by the pleadings as aforesaid, the case was tried in the said Superior Court for Clark County, before a jury, on or about October 31, 1933. At the close of plaintiff's evidence, defendant moved for a dismissal of said suit upon the grounds, among others, that plaintiff's evidence disclosed, as a matter of law, that the injuries, if any, sustained by plaintiff at the time and place mentioned in his complaint were proximately caused by risks of plaintiff's employment, which [13] risks were assumed by plaintiff. Thereupon the said Superior Court for Clark County heard arguments of attorneys for both parties, and, after due consideration, determined that plaintiff's evidence disclosed that, as a matter of law, injuries, if any, sustained by plaintiff at the

time and place alleged in his complaint were proximately caused by a risk of the employment, which risk was assumed by plaintiff, and thereupon discharged the jury from further consideration of the case and entered its judgment in favor of defendant. By reason of the facts herein set forth the said judgment of the Superior Court of the State of Washington in and for the County of Clark is a bar to this action by plaintiff for the same cause asserted in said action in said Superior Court and the matters adjudicated in said action in said Superior Court are res adjudicata.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that defendant shall have judgment for its costs and disbursements herein.

CHARLES A. HART
FLETCHER LOCKWOOD
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Defendant [14]

State of Oregon
County of Multnomah.—ss

I, A. J. WITCHEL, being first duly sworn, say that I am the Secretary of SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, defendant in the above entitled action, and that the foregoing answer is true as I verily believe.

A. J. WITCHEL

Subscribed and sworn to before me this May 9, 1934.

(Seal) PHILIP CHIPMAN
Notary Public for Oregon

My commission expires: Aug. 23 1935

Due service of the within amended answer is hereby accepted at Portland, Oregon, this 7th day of May, 1934, by receiving a copy thereof duly certified to as such by of attorneys for Defendant.

LORD
Attorney for Plaintiff

[Endorsed]: Filed May 11, 1934. [15]

[Title of Court and Cause.]

REPLY

Now comes plaintiff and replying to defendant's answer and to its first, second and third further and separate answers and defenses, denies each and every allegation, matter and thing therein contained, except so much thereof as is expressly set forth and alleged in and by plaintiff's complaint herein.

WHEREFORE plaintiff reiterates the prayer of his complaint.

WM. P. LORD
Attorney for Plaintiff

State of Oregon
County of Multnomah.—ss.

I, WM. P. LORD, being first duly sworn, on oath say: I am the attorney of record for plaintiff herein; I know the contents of the foregoing Reply and believe the same to be true. I make this verification for the reason that plaintiff is not at this time within the State of Oregon.

WM. P. LORD

Subscribed and sworn to before me this 24th day of April, 1934.

(Seal) MARIE BENNETT
Notary Public for Oregon

My commission expires Feb. 17, 1937

Service by copy admitted this 24th day of April, 1934.

CAREY, HART, SPENCER & McCULLOCH
of Attorneys for Defendant.

[Endorsed]: Filed April 25, 1934. [16]

[Title of Court and Cause.]

VERDICT

We, the jury empanelled in the above-entitled cause, find for the Plaintiff and fix his damages in the sum of Fifteen Thousand Dollars ($15,000.)

J. H. MOOS (Signed)
Foreman

[Endorsed]: Filed Sept. 29, 1934. [17]

In the District Court of the United States for the Western District of Washington,
Southern Division
No. 8354

LEO H. MARTIN,

Plaintiff,

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Defendant.

JUDGMENT ON THE VERDICT

This day, to-wit: November 13, 1934, this cause came on for hearing upon the motion of the plaintiff for a judgment on the verdict, the plaintiff appearing in person and with his attorneys and counsel, Harry Ellsworth Foster and Wm. P. Lord, and the defendant appearing through its attorneys and counsel, Charles A. Hart, Fletcher Rockwood and Carey, Hart, Spencer & McCulloch, and it appearing to the court that the jury duly impanelled to try the cause returned a verdict for the plaintiff in the sum of Fifteen Thousand Dollars ($15,000.00) on the 29th day of September, 1934, and, the court now being fully advised in the premises, it is therefore

ORDERED, ADJUDGED and DECREED that the plaintiff have and recover from and of the defendant the sum of Fifteen Thousand Dollars ($15,000.00), together with his costs and disbursements herein to be taxed.

DONE in open court this 13th day of November, 1934.

EDWARD E. CUSHMAN
Judge

Service admitted.

CARY, HUNT, SPENCER & McCULLOCH
Attys for Deft.

[Endorsed]: Filed Nov. 13, 1934
J. & S. 3 P. 850 [18]

[Title of Court and Cause.]

BILL OF EXCEPTIONS

The above entitled cause came on for trial before the Honorable Edward E. Cushman, one of the judges of the above entitled court, sitting in the United States District Court for the Western District of Washington, Southern Division, in the city of Tacoma, Washington, and a jury duly empaneled and sworn to try the cause, on the 27th day of September, 1934, at ten o'clock A. M., plaintiff appearing in person and by Mr. Harry E. Foster ~~and~~ Mr. William P. Lord, his attorneys, and defendant appearing by Mr. Fletcher Rockwood ~~and Messrs. Carey, Hart, Spencer & McCulloch~~, one of its attorneys.

At the opening of the trial and before the opening statement of counsel and before any evidence was received, defendant moved to dismiss the ac-

tion upon the ground that the court had no jurisdiction, and said motion was based on the pleadings and the facts set forth in a certain stipulation of the parties subsequently received in evidence as plaintiff's exhibit 4, and quoted in full in subsequent pages of this bill of exceptions, and after having heard the arguments by attorneys for both parties, the court denied said motion. The court's [19] action in ruling upon said motion to dismiss is shown in the following transcript of the proceedings at that time:

"THE COURT: In the Bezue case it went up from a State court. Direction was not to dismiss the case on its reversal.

It appears to the Court that this case should be distinguished from the Bezue case. There, the—as pointed out by the attorney for the defendant, the wheels being moved by the—it was injury, and not death, was it not?

MR. ROCKWOOD: I believe it was, yes, sir.

THE COURT: (Continuing)—by the injured man; had theretofore been removed from the engine; had been in the shop for a considerable time, and being returned to the engine to be replaced.

In the present suit it is clear that the engine was one used in interstate commerce; that immediately before had been in such use; that it was intended to be returned to such use; the stipulation is not detailed there, specific, but

the Court goes to Paragraph 7 of the complaint.

'That on said day the aforesaid trailer wheels were removed from said locomotive and were set endwise on said hereinbefore described skeleton truck; said trailer wheels were to be transported there from said place to said roundhouse across the aforementioned decking into the machine shop.'

Now, it was in the—as the Court understands the stipulation and pleadings, it was during that movement that plaintiff was injured.

The engine being generally an instrument of interstate commerce, and immediately theretofore an instrument in such commerce, to warrant dismissal it should be reasonably certain that the work being performed by the plaintiff at the time of his injury was so far removed in point of time, and nature, from that commerce as to not be an incident of it. It does not appear with any such degree of certainty such was the fact.

The motion will be denied.''

To the action of the court in denying said motion, defendant duly excepted and an exception was allowed.

During the direct examination of W. E. McCarty, a witness called and sworn on behalf of the plaintiff, questions [20] were propounded to the witness to which defendant objected upon grounds

(Testimony of W. E. McCarty.)

then specified, and objections were overruled, and defendant excepted to said ruling, and exceptions were allowed, as shown in the following:

"Q. What was the size and weight of those wheels as compared with the wheels shown in defendant's Exhibits A-1 and A-2?

MR. ROCKWOOD: I object as incompetent, irrelevant and immaterial. There is no allegation in the complaint upon which—to which this testimony can point. The fact is, this man knew what wheels were on the truck, and what the truck was used for, previously, thereto, is immaterial.

THE COURT: Objection overruled.

MR. ROCKWOOD: Exception.

THE COURT: Allowed.

(Question read).

A. Well, I have to just guess that. The pony truck wheel, I judge probably weigh, axle and all, wouldn't weigh over fifteen hundred pounds.

Q. And how long was it after that truck was built before they started carrying the wheels shown in the exhibits referred to?

A. Well——

MR. ROCKWOOD: Same objection.

THE COURT: Objection overruled.

MR. ROCKWOOD: Exception.

Q. How long did the S. P. & S. have that skeleton truck before wheels of that type were carried upon it?

(Testimony of W. E. McCarty.)

A. I couldn't state definitely that.

Q. Well, approximately?

A. Well, that truck, if I remember right, was built when Mills came in there as foreman—general foreman. I couldn't state just when that was.

Q. Could you give us the year?

A. It might have been a year. I don't know." (121-122) [21]

After plaintiff had rested his case in chief, and defendant had called witnesses and rested its case, plaintiff called in rebuttal a witness, Roy Buttner, and on direct examination of said witness on rebuttal, a question was asked of the witness, to which defendant objected and the objection was overruled and defendant excepted thereto as shown in the following:

"Q. Do you know when the floor in front of the clock where this accident happened was repaired?

MR. ROCKWOOD: Just a minute. I object to that as incompetent, immaterial and irrelevant, and improper rebuttal.

MR. FOSTER: Defendant's witnesses testified it was repaired before this accident.

THE COURT: Objection overruled.

MR. ROCKWOOD: Exception.

THE COURT: Allowed:

A. It was repaired some time after the accident." (206)

(Testimony of W. E. McCarty.)

After plaintiff had rested his case in chief, and defendant had called witnesses and rested its case, plaintiff called in rebuttal a witness, Price Buttner, and on direct examination of said witness on rebuttal, a question was asked of the witness, to which defendant objected and the objection was overruled, and defendant excepted thereto, as shown in the following:

> "Q. With reference to the occurrence of this accident, do you know when the floor at that point was repaired?
>
> MR. ROCKWOOD: Same objection I made to the question of the previous witness.
>
> THE COURT: Objection overruled.
>
> MR. ROCKWOOD: Exception.
>
> THE COURT: Allowed.
>
> A. A short time after the accident." (208) [22]

After both parties had rested, defendant moved the court to dismiss the case upon the ground that the court had no jurisdiction, and said motion was denied and defendant excepted thereto, as shown in the following:

> "At this time I wish to move for a dismissal of the case on this ground, the federal court and particularly this Court has no jurisdiction to hear this case, because the evidence, consisting of the stipulation and the testimony of witness Morrison, shows that the plaintiff at the time of his injury was not engaged in in-

terstate commerce within the meaning of the Federal Employers' Liability Act.

The burden is upon the plaintiff to prove the jurisdictional fact, and I wish to rest my motion upon the further ground that the plaintiff has failed to sustain the burden of proving the jurisdictional fact, upon which the jurisdiction of this Court must rest.

Now, if you wish to have me argue further on that point before I make my next motion, I will.

THE COURT: Motion denied.

MR. ROCKWOOD: Exception, please.

THE COURT: Allowed." (208-9).

After both parties rested and before the case was argued to the jury, defendant moved the court for a directed verdict in its favor upon grounds, as shown in the following:

"MR. ROCKWOOD: Now, at this time the defendant moves for a directed verdict in its favor on the ground that the plaintiff has failed to sustain the burden of proof to show that the —any negligence of the defendant alleged in the complaint was the proximate cause of this accident; upon the ground that the evidence is insufficient to prove that the defendant was negligent in any of the respects charged in the complaint, and upon the ground that it appears affirmatively and as a matter of law that the injuries sustained by the plaintiff, as

alleged in the complaint, were proximately caused by risks of the employment which were assumed by the plaintiff." (209). [23]

After hearing argument by counsel for defendant in support of said motion for a directed verdict, the court denied said motion, and to the denial of said motion defendant excepted and said exception was allowed, as shown in the following:

"THE COURT: Motion denied. The question does not appear to be close, insofar as negligence and proximate cause is concerned. It may be a closer question regarding assumption of risk, but even so, taking into consideration the fact that the Court must give the testimony for the plaintiff the most favorable construction on a motion of this kind, in which it is reasonably susceptible—the plaintiff testifies that after having tried to —having been directed by Mr. Morrison to pry on this wheel, after having attempted to do so in a position away from the axle, he was told to—I can not quote it, but he was directed to get a more direct purchase on it, in effect.

MR. ROCKWOOD: I do not believe there is any testimony Mr. Morrison or anyone else told him anything except to get a bar, and after he had got the bar, I believe I am right in stating there is no testimony whatsoever there was any further instructions. Is that not right?

MR. FOSTER: As I remember the testimony, he was directed precisely what to do.

MR. ROCKWOOD: To get a bar and put under the wheel, and raise it.

MR. FOSTER: I think it was more precise than that.

THE COURT: While it is true that the defense of contributory negligence is only a partial defense, yet there are certain well recognized rules in relation to a defense of contributory negligence that necessarily apply on this matter of assumption of risk. The particular one I have in mind is that where it is the Court or the jury that is considering the question, one of the things that must be taken into account is the opportunity to realize the danger. Now, the danger in part did not consist of something coming up behind and striking him, but it consisted in the relation that—that his foot, his left foot when he was pushing it with his weight on the ball of that foot, and his heel raised—the relation that would exist between that and the distance between the tread of the wheel on this truck, and [24] the floor—the decking, on which the ball of his foot rested, as the Court assumes, may well have been, that his body was extended and muscles rigid, and his foot held very firmly on the decking. Now, it may reasonably be assumed that he did not realize the exact—or the position that was

going to bring his foot and ankle, in relation to the tread of the wheel.

The Court cannot say that reasonable men might not conclude that he did not realize that danger.

Motion denied.

MR. ROCKWOOD: Your Honor please, may I have an exception?

THE COURT: Exception allowed." (210-212).

Prior to the argument of counsel to the jury, defendant presented to the court its written request that the court instruct the jury as follows:

"In his complaint, plaintiff charges that the defendant was negligent in that the method adopted by the defendant's foreman in transporting trailer wheels was not reasonably safe by reason of the condition of the decking or flooring of the roundhouse, and by reason of the sprung condition of the truck upon which the wheels were being moved. I instruct you that the evidence shows that plaintiff, before he began the particular task in which he was engaged at the time of his alleged injury, was aware of the condition of the flooring and was aware of the condition of the truck which caused the truck to stick or stall while being used in the transportation of trailer wheels. Likewise plaintiff knew, or in the exercise of his ordinary powers of observation, should have

known of the dangers incident to the condition of the floor and the condition of the truck. Consequently, plaintiff, when he began the task, assumed the risk of dangers arising from the condition of the floor and the condition of the truck. Since plaintiff assumed the risk of the dangers I have mentioned, he cannot recover from the defendant for injuries which he may have sustained on account of the condition of the floor and the condition of the truck. For those reasons, the allegations of negligence with respect to the condition of the floor and the condition of the truck are withdrawn from your consideration and you cannot base any recovery by the plaintiff on those allegations of negligence." [25]

In the court's instructions to the jury, he did not give said instruction, and to the refusal of the court to give said instruction, defendant excepted upon the ground that the evidence showed that the plaintiff had assumed the risk of dangers arising from the condition of the floor of the roundhouse, and said exception was duly allowed.

Prior to the argument of counsel to the jury, defendant presented to the court its written request that the court instruct the jury as follows:

"One of the allegations of negligence set forth in plaintiff's complaint is, briefly, that the defendant's foreman should have directed four men to take crowbars and to place the ends

of the crowbars, two at the side of the forward end of the truck and two at the rear of the truck, and should have directed two men to hold the tongue of the truck to guide it, and that the foreman should then have given a signal for all workmen to lift and pry in unison. I instruct you that the evidence discloses that plaintiff was fully aware of the manner in which the work was being done in order to move the truck forward after it had stalled just before the plaintiff was injured, as he alleges. The dangers inherent in the method of work as actually done were as apparent to plaintiff as to the defendant or any of its employees. For that reason it follows that the plaintiff assumed the risk of injuries, if any, which may have resulted from the fact that the method then adopted was being used. For that reason you cannot base any recovery by plaintiff upon the charge of negligence with respect to the number of men working on the truck at the time of the alleged accident and the charge with respect to the number of crowbars then being used."

In the court's instructions to the jury, he did not give said instruction, and to the refusal of the court to give said instruction, defendant excepted upon the ground that plaintiff was shown to have assumed the risk of injuries in the respect charged in the complaint and referred to in the instruction, and said exception was duly allowed. [26]

Prior to the argument of counsel to the jury, defendant presented to the court its written request that the court instruct the jury as follows:

> "The complaint alleges, as one charge of negligence, that the defendant was negligent and careless in maintaining the floor in an uneven and worn-out condition and in using a truck the side of which was sprung, as alleged in the complaint. I instruct you that the dangers inherent in the operation of movement of the trailer wheels by the truck over the floor in its then condition, and with the truck in its then condition, were as apparent to the plaintiff as to the defendant and for that reason plaintiff assumed the risk of injuries resulting from the movement of the truck in its then condition over the floor in its then condition. For that reason you cannot base any recovery by plaintiff on the allegation of negligence with respect to the condition of the floor and the condition of the truck."

In the court's instructions to the jury, he did not give said instruction, and to the refusal of the court to give said instruction, defendant excepted upon the ground that plaintiff was shown to have assumed the risk of injuries in the respect charged in the complaint and referred to in the instruction, and said exception was duly allowed.

Prior to the argument of counsel to the jury, defendant presented to the court its written request that the court instruct the jury as follows:

"The complaint alleges that the defendant was negligent in that the foreman, after adopting the method of movement of the truck in the manner alleged in the complaint, should have warned the plaintiff of the dangers of the truck moving forward as alleged in the complaint and should not have directed the plaintiff to work in the position described. I instruct you that the dangers inherent in the performance of the work as was done by the plaintiff after the truck had stopped were obvious to anyone using his ordinary powers of observation. For that reason there was no duty upon the defendant or its foreman to warn plaintiff of such dangers. There is no duty upon a master to warn a servant of dangers of the employment which are open and obvious and which should [27] be discovered by the servant in the exercise of his ordinary powers of observation. Consequently that charge of negligence which I have just referred to is entirely withdrawn from your consideration and you are not permitted to base any recovery by the plaintiff on that charge of negligence."

In the court's instructions to the jury, he did not give said instruction, and to the refusal of the court to give said instruction, defendant excepted upon the ground that plaintiff assumed the risk of danger of the truck moving forward, and said exception was duly allowed.

The evidence and the proceedings at the trial, necessary to present clearly the questions of law involved in the rulings to which exceptions were reserved, are set forth in the following

CONDENSED STATEMENT OF EVIDENCE

At the opening of the trial and before the jury was empaneled, there was filed with the clerk a stipulation signed by attorneys of record for the respective parties which, with caption, title, and signatures of attorneys omitted, reads as follows:

> "It is hereby stipulated between the parties hereto through their respective attorneys, as follows:
>
> The number of the locomotive from which the trailer wheels, which plaintiff was assisting in moving at the time and place alleged in the complaint, had been removed, was No. 622 instead of No. 623, as alleged in the complaint.
>
> Locomotive No. 622 was owned by defendant at the time of the accident and was of a type suitable for service on passenger trains. The last transportation service in which said locomotive was used by defendant prior to April 22, 1932, was on defendant's passenger train No. 1, which left Spokane, Washington, in the evening of April 15, 1932, for movement to Portland, [28] Oregon. Said train handled interstate commerce. Said locomotive, however, was operated on said train from Spokane only to Vancouver, Washington, and while said

locomotive was used on said trip, the operation of said train was entirely within the state of Washington. Said train arrived at Vancouver, Washington, at about 7:05 A. M. April 16, 1932. Said locomotive was then uncoupled from said train and operated to defendant's roundhouse at Vancouver, Washington. It arrived at said roundhouse at 7:15 A. M. April 16, 1932.

The next transportation service in which said locomotive was used began at 7:05 A. M. April 23, 1932. At that time it was attached to defendant's passenger train No. 1 at Vancouver, Washington, and hauled said train to Portland, Oregon. Said train handled interstate commerce.

Said locomotive was continuously in said roundhouse at Vancouver, Washington, from the time of its arrival at 7:15 A. M. April 16, 1932, until it was moved from said roundhouse the morning of April 23, 1932, for use on said passenger train No. 1 on said day.

Said locomotive was one of a group used by defendant in passenger service, and, when in service, said locomotive was customarily used on passenger trains Nos. 1 and 2 between Spokane, Washington, and Portland, Oregon.

The normal cycle of use of a locomotive in service continuously on said passenger trains Nos. 1 and 2 was as follows:

First Day:

Leave roundhouse at Vancouver, Washington, in the morning; haul train No. 1 from Vancouver, Washington, to Portland, Oregon, to arrive at Portland at approximately 7:30 A. M. Remain in Portland during the day; leave Portland in the evening to haul passenger train No. 2 from Portland to Spokane.

Second Day:

Arrive Spokane in the morning; remain in Spokane during the day; leave Spokane in the evening to haul passenger train No. 1 from Spokane to Vancouver, Washington.

Third Day:

Arrive Vancouver, Washington, at approximately 7:05 A. M. Uncouple from train and proceed to roundhouse at Vancouver, Washington. Remain [29] in roundhouse during the day.

Fourth Day:

Remain in the roundhouse until removal in the morning, to be attached to train No. 1 for movement from Vancouver, Washington, to Portland, Oregon, to commence another cycle.

At the time said locomotive No. 622 arrived at Vancouver, Washington, and was removed to the roundhouse the morning of April 16, 1932, it was reported by the engineer who had been operating said locomotive in its last transportation service that 'lower rail of engine

frame broken left side just over back engine truck wheel'. Because of that defect, the engine was at that time not suitable for further transportation service until said defect had been repaired. After the arrival of said locomotive at the roundhouse the morning of April 16, 1932, and while it was in the roundhouse in the interval from April 16 to April 23, 1932, the repair work done upon said locomotive, as indicated in the original locomotive inspection report, a part of the records kept by the defendant company in compliance with regulations and orders of the Interstate Commerce Commission, was as follows:

'REPAIRS NEEDED	Repaired by
lower rail of engine frame broken left side just over back engine truck wheel	Beard & Smidth
Glass broken in headlight	J. B.
back corner of mud ring leading (copied W. J. M.)	Renas
1. Key all rods & L butt end brass cracked	Englehart welded main
2. Put split key L. #2 brake shoe bolt	Englehart
3. Bolts broke and loose in braces top pilot beam	J. B.
4. Pilot loose	J. B.
Washed boiler	Hickman

5. Frame broke over L #2 eng truck	Beard & Smidth
6. Bolts loose front end L inside trunion frame	Englehart
7. Clamp loose keeley pipe R B cor eng	Groethie
8. Bushing wore both M Equalizers (inspected and found serviceable) (W.J. M.) Trailer tires turned on account of shelling	Waggle
9. Set up all wedges	Englehart set up wedges
10. Tighten all binder bolts	Englehart [30]
11. L M Brass 3/32 & R M Brass 1/16 loose in boxes (Inspected and found serviceable W. J. M.)	
12. Bolts working splice front L. #1 driver	Englehart
13. Binder bolts bent and loose L #2 eng truck	Englehart
14. Put wheel on Keeley valve over L. #2 eng truck	Groethie
15. R. #2 driver strikes spring saddle (Throwed—McNerney)	
16. Handle loose on valve at B End R main driver	Groethie

17. Steam pipe loose to R. Ing.	Groethie
18. R # 3 spring slipped in band (inspected and found serviceable—W. J. M. slipped ¼″)	
19. Bushing wore R Eccentric rod (copied 4-16-32 O. F.) (inspected and found serviceable W.J.M.)	
20. Glass broke in H. L. Cage	J. Beedle
21. Blower pipe leaks where screws in manifold (copied 4-16-32 O. F.) W. B. Livesay, Inspt. 4-16-32—10 A. M. Replaced brick on back wall where removed to calk leak	Groethie Albert.'

Upon the removal of trailer wheels which plaintiff was assisting in moving at the time when, by his complaint, he alleges that he was injured, said locomotive was not in condition for use in any transportation service.

The facts herein stated are admitted by both parties and this stipulation may be used by either party at the trial of the above entitled case without further proof of the facts herein stated.

Both parties reserve the right to offer any additional testimony competent to prove any facts relevant under the issues raised by the pleadings relating to the nature of the use of said locomotive No. 622, the nature of the repairs performed on said locomotive during the period between April 16, 1932, and April 23, 1932, and relating to the condition of said locomotive at the time referred to in the complaint.

Dated September 22nd, 1934."

and said stipulation was subsequently received in evidence as plaintiff's Exhibit 4 (165). There was received in evidence [31] upon the offer of plaintiff, plaintiff's Exhibit 1, which consists of a wooden model of a truck and of locomotive trailer wheels owned by defendant, more particularly described in subsequent testimony. (38).

Prior to the calling of witnesses by plaintiff, and with the consent of counsel for plaintiff, there were offered and received in evidence four photographs designated respectively defendant's Exhibits A-1, A-2, A-3, and A-4. (38-39).

LEO H. MARTIN, the plaintiff, produced as a witness in his own behalf, testified as follows:

Direct Examination.

My name is Leo H. Martin. (40). I live at Vancouver, Washington. My family consists of a wife and two children. (40). I was employed by defendant Spokane, Portland and Seattle Railway

(Testimony of Leo H. Martin.)

Company as an engine viper from August 15, 1929, until April 22, 1932. (40). When engines come into the roundhouse engine vipers clean them up and clean up the wheels and the running gear before they go back onto the road. (41). During the month of April I had other duties. I did whatever kind of work I was ordered to do by the foreman and assisted generally around the roundhouse. (41). The weight of the wheels of the engine involved in this case is a little over two tons. The distance between the wheels is around four feet, four feet and some inches. (42). The length of the channel iron of the truck involved in the case is around six feet or a little better. I cannot say just how long the goose neck of the truck is. (42). The tongue of the truck is about four feet long. (42). The truck had one set of wheels on the rear of the channel iron (42) and "two regular little truck wheels set together in front". (42). [32] The height of the side of the channel iron was around an inch and a half or two inches, and the thickness of the bottom was about half an inch "as near as I could figure. Maybe not quite that thick". The truck was constructed of steel. (42). Defendant's Exhibit A-4 is a picture of the truck that I was injured on. (42). Defendant's Exhibit A-6 is a picture of the same truck taken outside of the shop. (42). Defendant's Exhibit A-5 is a picture of the truck with trailer wheels loaded on the truck, and defendant's Exhibit A-1 is another view of the truck loaded

(Testimony of Leo H. Martin.)
(43). The roundhouse includes, first, a boiler shop, then the running repair department, then the back shop, and then the machine shop set off—kind of an ell. (43). On the occasion in question, the distance that I was required to transport the wheels was between three and four hundred feet over a plank floor, "two by twelve, if I remember right". The state of repair of the planking was very poor. The planking has knots along it, quite a few knots, and then they use pretty good sized spikes to drive that down, and there are places from dragging such things as the truck over the floor where the floor was wore down and these knots stick up and then some of the nails stick up and bend over where you run into them. (43-44).

The tracks in the roundhouse run up to within ten feet of the wall, all the way along, until we come to a point where there are two tracks that run to the machine shop. (44).

The accident in question happened about eleven o'clock, "as near as I remember", in the forenoon. (44). I received orders to assist in moving the wheels about fifteen or twenty minutes before eleven, I could not say for sure who gave me the order. The order was given by one of the foremen. (44). [33] I received orders to help move these trailer wheels into the back shop. I was in the roundhouse at the time. I had to go about the distance of a couple of engines to the point where I was to work. I cannot tell where the truck was,

(Testimony of Leo H. Martin.)

but we were ordered to get the truck and bring it there and load the wheels. (45). After receiving the orders, we first went after the truck. The wheels were in the roundhouse. About seven or eight men were engaged in the work of moving the wheels. (45). I can give the names of some of the men. They included Harry Pickett, Dave Reeder, Price Butner, Frank Pedore—I am not sure about Pedore. He might not have been there. (46). To get the wheels on the truck, we would take this truck up there to the rails and roll the wheels off in this case where we was going to the machine shop, off on to the floor, on to this plank floor, and then take a couple of blocks and put underneath it right up next to the cart, and then roll these wheels—back them up and take a run at it, and roll these wheels up on the cart. (46).

When the truck was empty, the distance from the channel iron to the floor was around an inch. When it was loaded, one side was lower than the other because it was sprung out of shape on this side where it was cut. (46). After the truck was loaded, I could not say exactly the distance between the channel iron and the floor, but it was probably around a half inch. (47). The rest of the truck was not changed in its position with relation to the floor after loading, "only the front end of it was all that sprung down that I know of". (47). After loading, the wheels were so heavy on it, it would spring down towards the floor, closer, all the time. (47).

(Testimony of Leo H. Martin.)

At the time in question, the condition of the truck was poor. It was cut down on the side, [34] and was sprung down. The heavy loads on it had caused it to bend down on that side where the cut is on the side of it for the wheels to roll in on the right side. It is cut more on the left side and therefore it was weaker than it was on the other side. (48).

After we loaded it, we had put probably a man on each side of the axle, maybe one or two behind, and a couple on the tongue, and maybe a man on the side of the wheel where the cart sagged down to hold it there to keep it from rolling off. (48). After the truck was loaded, I received no orders about moving the truck until "we got hung up there". (49). After we started moving the truck, nothing happened until we got to this place where it was stuck. (49-50). It came on to a little depression there in the floor and we could not push it any farther. It was stuck there. The front end was sprung down. Where there were places in the floor higher than others, why, it would hang up on the floor. The weight on the front end of the truck squashed it down and kind of sprung the channel iron—just kind of opened it up there where the holes were cut in the side of it. (50). After the truck stuck, I received orders from Mr. Morrison, the foreman on the job. When Mr. Morrison issued the orders, he was standing across from me on the other side of it (50) around five or six feet from me, something like that. (51). At that time he was

(Testimony of Leo H. Martin.)

standing there watching what was going on. He was roundhouse foreman, that is, the running repair foreman. (51). He was in charge of the truck at this time and was taking it in there. (51). The order which he gave to me was, "Martin, get that bar and put it under the wheel there, and see if you can't——". (51). As near as I can remember, he said, "Martin, get that bar and put it under the wheel and raise [35] up on it and see if you can get that raised off that high place." (51-52). The bar was standing up against the wall. The bar was around six feet long. I got the bar and put it under and raised up on it. (52). I cannot say whether any one else was given any orders at that time. I know that another man got a bar and put it under the back end of the truck. (52). Harry Pickett was the man. I cannot say whether Pickett received any orders in that respect. (52).

After I got the bar, the foreman did not give me any orders to the use of it after I got over to the truck, he just told me in the first place to take the bar and put it under the wheel and see if we could raise it up. (52).

As near as I can remember, one man with a bar was working on the wheel directly behind me. (53). The foreman was standing on the other side of the journal from me. He had a view, the same as I would have standing off from the side of anything like that, about four or five feet. (53). The fore-

(Testimony of Leo H. Martin.)

man's view was such that he could see all of the crew. (53).

After I got the bar I put it under the wheel and raised up on it, and the flange is slick on those wheels, smooth and slick, wore that way. They were worn off too much to run on the track any more, and this bar would slip up around the edge of the flange, and so when the bar slipped up, I tried it there a couple of times, and when it slipped up, I moved over so that I could get a hold on it where it would not slip up the side of it, and I did move around next to the axle and got a hold of it and raised up. (53). It slipped off about twice, as I remember. After it slipped off, I did not receive any additional orders from my foreman. (54). When I raised up on there, the cart shot ahead. Ordinarily when I would use a bar it would move [36] probably the length of the bite I had, just get off the bar and then stop, but at this particular place, there is a little slope there where it goes down to the tracks, and where the rail comes through there, and I may be behind the wheels when I was coming along there pushing, I was not paying any attention to what was ahead of it because we never moved fast enough to run over anything, " . . . so then, I—when it moved off of there, why it just went right down this place where this fellow with the bar on the back end of it, you see, and me raised up there, took enough weight off of it to take it over the knot, or the high place on the floor, and

(Testimony of Leo H. Martin.)

this other man with the bar on the back end raised up on it, and on this slick iron, and slope, it just shot ahead and caught me on the back of the right foot and just twisted my leg out and I grabbed—I took a hold of the front wheel, with my hand on the front wheel and struck me on the back and went down to my knees, and my foot rolled off from under the edge of it, and then I pulled myself up on it." (54).

I did not know there was a man behind with a bar until the cart had stopped. I knew that there was a man went after another bar, but I did not know that he was there at the time. (55).

After I started prying, I received no warning directions or orders from the foreman.

When I raised the wheels with the bar to raise the weight off the cart so that it would move ahead, this wheel on the back caught me on the ankle, that is, just above the ankle in the back of my foot, and just kind of crushed it into the floor, and it was just turned—just twisted my leg and tore a joint loose in my back and I dropped over and took ahold of the flange on the front end, and I pulled myself up and got out of [37] there. The car stopped when it hit the track down below there. (55-56). I went to my knees. Just at the time I went down, and as I was raising myself up, Mr. Morrison looked over and said, "What is the matter, Martin, you get hurt?" and I said "I guess so". I straightened up the best I could and got out of the way of the

(Testimony of Leo H. Martin.)

wheel. After that I leaned up against the wall until I could get out of there, and finally I got so I could walk a little bit, crawl around, and went back in the roundhouse. I did not continue my duties the balance of the day. I did not assist in moving the truck any more. I stayed around until quitting time, and then went to the office and called my wife to come after me. (56-57).

At the time of the accident there were other methods available in the roundhouse for moving truck wheels. I could not say for sure just which tracks were clear and which ones were not, but at times we have rolled the wheels out of the door of the roundhouse and rolled them out on another track, and then down around the outside of the roundhouse and into the machine shop, and the track runs right into the machine shop and into the lathe, where they pick them up with the hoist, and put them on the machine, and then the other way around, on to the turn table, there is two tracks running in there, one on each side of the lathe. (62-63). The truck was used for smaller wheels, too, like pony trucks, and the front of the engine.

I do not know whether the truck was in use prior to 1929, before I came into the shop. (63).

Cross Examination.

I am thirty years old. I began to earn my living at [38] manual labor when I was about fifteen years old, and ever since that time I have worked on and

(Testimony of Leo H. Martin.)

off at manual labor. I was engaged at several places in eastern Oregon working on ranches, and on those ranches, did the heavy work of a ranch hand. (64). I worked for Swift & Company, running an electric drier and baler, which is manual labor. (64). I was in the army three years, eleven months and twelve days, and while in the army, some times did heavy labor. (65). I worked for the Spokane, Portland and Seattle Railway Company not quite three years, and during all of that time worked in the shops at Vancouver. At the time of the accident in April, 1932, I was on the payroll as a laborer. (65). During my work for the SP&S, I have done heavy manual labor. (65). I was familiar with the job of doing heavy manual labor, at least I got by. (66). At different times while I worked in the roundhouse, I had occasion to assist in moving heavy machinery. I had worked a good many times moving this particular truck with trailer wheels on it. I knew for a long time that the floor was rough from the movement of heavy machinery over it, and I had seen these bumps in the floor caused by knots in the plank many times, and I had seen these places where nails were sticking up in the floor many times before this accident happened. (66).

"Q. It was not very much about that plank flooring that you did not know about, was it? You knew things fairly well before this thing happened, didn't you?

(Testimony of Leo H. Martin.)

A. Yes, I knew the condition of it." (66-67).

The accident happened near the time clock. I had to go to the time clock at various times of the day to punch the clock, and I had been over the floor near the point where the accident happened on many occasions on each of the prior days. [39]. I had had plenty of opportunities to learn the condition of the floor. (67). I had gone over that part of the floor where this slope was located a good many times. (67). I had walked across it, and if I had glanced down at the floor I would have noticed the condition of the floor at that point. There was nothing concealed or hidden. The condition was right on the surface of the floor.

"Q. But, you could not see the surface was sloping?

A. No, sir.

Q. In other words, it did not slope enough so it was noticeable, is that right?

A. No, sir.

Q. That is your answer, it did not slope enough so it was noticeable?

A. No, sir, I said it sloped enough so you could see it.

Q. But, despite the fact you walked by them many times each day, you never noticed it sloped until after the accident, had you, is that right?

A. Well, before—just walking along there, you would notice it every time, but this cart

(Testimony of Leo H. Martin.)

at this time, and the wheels on it, you could not notice, or I did not notice it.

Q. Well then, your answer is, standing behind this wheel you forgot that slope, isn't that about it?

A. I was busy working. I was not looking for any slope.

Q. So, you did not stop to think about the slope that was there, isn't that about the size of it?

A. No, sir.

Q. You were not in a position from your place behind the wheels to see the floor, is that it?

A. No, sir.

Q. Well, was my statement correct, as I made it in my question? I did not quite understand your answer. As I stated the fact in my question, was I correct that you were behind the wheel, and [40] consequently could not see the part of the floor where the slope was, is that a correct statement of the fact?

A. Yes, sir, I was behind the wheel and could not see it.

Q. So, that you knew the slope was there, but you could not see it from the position in which you were standing when you were working on the wheels at this time, that is correct, is it not?

A. Yes, sir." (69).

(Testimony of Leo H. Martin.)

The diameter of the trailer wheels loaded on the truck was about four feet. (69). The diameter of the front wheels of the truck itself was about six inches. (69).

I could not say exactly how long the slope was that I have described. I would say it was between two and a half and three feet. (70). The planks of the floor were laying endways. That is, in the direction in which the truck was moving, so that the butt end of the plank was up against the rail. The back end of the truck was on the level. I could not say that the front end was on the slope, but it was close to the slope. (70). The diameter of the back wheels of the truck are the same as the front.

The floor was of a material such that it became splintered, like fir lumber, from constant use. It was rough all over the surface. The joints were not even.

With the back end of the truck on the level when I pried it, it shot forward suddenly, but not from my prying. It was from the prying from the other bar, and a lot of other men pushing. The truck moved forward down to this track, whatever distance it was. (71-72). I could not say how deep the groove was along the track. It was not so very deep, just a little slope down to it. On the other side of the rail, the floor was a little bit higher than the level of the rail, be- [41] cause they just put planks in there, and did not hew them all, and made them a quarter of an inch higher than the rail. (72). The

(Testimony of Leo H. Martin.)

truck was then moving slowly enough so that it stopped of its own accord after it shot forward suddenly. (72).

I had worked on many occasions moving wheels on this truck, and pretty close to every time we moved it, the truck got stuck some place along the floor, and I knew when I began to move the truck that it was liable to stick somewhere along the floor, and that was the customary experience in using the truck, and I had all of that knowledge prior to the time that we started moving the truck at the time of the accident. (73). But I was never stuck in that particular place, but it had stuck in numerous other places along there. It stuck at numerous other places around the roundhouse floor, and I knew all of that before the accident happened on April 22, 1932. (72-73).

I am right handed but I use a tool left handed. (74-75).

As I was standing between the two wheels to pry before the truck moved, my back was towards the axle, on the right side of the axle, and I was standing there between the crowbar which I had in my hand and the axle. (77-78). As I was prying, I was in a position such as I now illustrate. (78). (Counsel for defendant placed pencils on the floor, as the witness took the position, at the forward end of the right foot and the left foot, respectively.) (78-79). It is pretty hard to tell how far my right foot was from the flange of the forward wheel at the time the

(Testimony of Leo H. Martin.)
truck started to move forward. (79). I could not state the distance because I just took the bar and shoved it in under, and was down and lifting on it. The bar was about six feet long. I do not know what part of the bar I had hold of, but it was probably back at least as far as the middle of the bar. (79). [42] I would not say that I had hold of the bar as far back as three feet. I just stuck it under there to pinch it ahead. I could not tell exactly how much of the bar was behind me and how much was between my hands and the flange. (80). I do not know how far my forward foot was from the flange, but I don't say that it was as close as six inches. I know my heel got under the rear wheel and got smashed. (80). (It was stipulated between counsel that the distance between the toes of his right foot and his left foot as the witness took his position for illustrative purposes was twentyfour inches.) (81). The distance between the wheels to the outside of the flange is four feet eight and a half inches. The flanges are all of an inch thick, so that the distance between the wheels inside the flange would be about four feet six inches. (81-82). At a former trial of this case, I testified that the distance between my right toes and my left toes as I stood to pry, was about twentytwo inches. (82-83). At that former trial, I testified that my rear foot, as I stood to pry, was pretty close to four feet from the flange of the forward wheel. (83-84). As I stood in position to pry, the bar extended out to the

(Testimony of Leo H. Martin.)

outer edge of the rear wheel. (84). The trailer wheels were about four feet in diameter. The axle of the trailer wheels was about nine inches, and the channel iron is about ten or twelve inches wide. I could not say how far I stood from the center of the axle. I was right along side of it, and my back was pretty close to the axle. I took hold of the bar in a position so that I could exert force to move the truck forward, and I wanted to be able to exert considerable force with the crowbar. (85). I cannot say how far back from the front wheel my hands were on the bar. (85). They were in a position just like you would take a bar and get back up between two wheels like that and shove it [43] under there, and you could not tell exactly how far it would be. (86). At that time I knew that other members of the crew were pushing on the wheels to move it off this place, and I knew that men were in back of me pushing to move it forward, and I knew that when I took my position with the bar, and I expected the wheels to be moved forward to a certain extent, and I knew that that was what the other members of the crew were trying to do, and it did not surprise me at all when that back wheel moved forward in my direction. (86).

"Q. . . . When the truck moved forward, it moved some distance before it came to a stop, did it not?

A. It moved some farther than it ever had before when I pinched it, yes, sir." (86-87).

(Testimony of Leo H. Martin.)

I fell forward after I got my foot caught. (87). I did not see the man use the bar at the back end, but when I raised up, he had the bar in his hand and was going to put it under to pinch it again to get it out of this hole. I did not know ahead of time that Pickett had a bar. (87). I knew some men were behind trying to push it. I did not know beforehand that Pickett had a bar. I knew he went after one. (87). There was a man on the left side of the axle at the front wheel, and he was supposed to be pushing, and I knew that was what he was there for, and before the truck stalled there had been a man pushing at that point, that is, on the front wheel on the left side of the axle. While I was using the bar, he was still there. Whether he was pushing or not, but he was supposed to be pushing. There were seven or eight men working on the job. I could not tell how many men were on the back, but so far as I knew, everybody was on the job doing as they were supposed to do, and the job of everyone was to move the truck forward. (89). [44]

The only instructions that Morrison gave me were before I got the bar, and after I got the bar, I tried at least twice to pry from a position different from that which I used at the time of the accident. Morrison did not tell me about changing positions. He told me to pry, to put it under and pry. (89).

(Testimony of Leo H. Martin.)

"Q. I say, no one told you how to place yourself to get the best leverage, and the selection of the place where you did go to, was your own idea, wasn't it?

A. Well, it was where I had to get to move it.

Q. Well, no one told you. That is what you decided, wasn't it?

A. Well, he told me to put it under the wheel or under the front end and raise it up.

Q. And that is all he did tell you, so the selection of the precise place, the exact place was your own idea, wasn't it?

A. Well, it had to be, to move it." (89-90).

At a former trial, I testified as follows:

"Q. And did you know by your experience, or otherwise, that there was danger to you in working in the position in which you then assumed?

A. I had worked around it before different times. I never happened to get caught in there. Never was in the first place, I shoved the bar under there when I was standing out a ways from it, but the bar slipped off twice, I think, and then I had my back to this axle, and just moved over enough so I could get under. I did not realize really how close I was to the wheel—how close to the journal, until it hit me." (89-90).

(Testimony of Leo H. Martin.)

At a former trial, I testified that the truck never did make a trip unless it got hung up at some place or other. (91).

> "Q. Before this accident happened, you knew that the cart was in the condition in which it was, at the time of the accident, didn't you? You knew that it bent when a heavy load was put on it, as you have described it?
>
> A. Well, I knew it had before. I don't know—I never paid any particular attention to it at [45] that time.
>
> Q. But, on previous occasions you had seen it act just that same way, had you not?
>
> A. Yes, sir, in some places." (91-92).

Redirect Examination.

While I was prying with the crowbar at the time of the injury, I was not able to see the condition of the floor around me. I did not know that the truck was on the slope at the time. I found that out when it started to move. When the truck started, it moved probably two and a half or three feet before it came to a stop. At the time the car moved, I knew that there had been a good many men pushing on it with their hands. (93). I did not notice any signals given by the foreman at the time the truck started. I could not say how fast it traveled. It just went right down to this track, and before, why it would just move what you pinched, until you got

(Testimony of Leo H. Martin.)

it off, and you could push it without any pinching of the bar. (94).

Defendant's Exhibits A-1, 2, 3 and 4 do not show the condition of the truck as it was at the time of the injury. It is reinforced in different places. It was reinforced where it was cut out. Since I was injured, it has been straightened out and reinforced till you would not know it was the same cart if you never saw it before, that is setting up as straight as it is there. It was reinforced by electric welding. I could not tell the dimensions of the reinforcement. I do not know when the repairs were made after my accident. (95). It was the right side of the skeleton truck which was sprung. I could not say how far it was sprung. It just bent down towards the floor. If it had been straight up, like it is now, there would not have been near as much danger of [46] getting hung up on anything. (95).

Recross Examination.

By electric welding there is no more material in it after you get through with it than there was before, but just substituting something, but it would strengthen it. There is no more material in the channel iron now than when it was new, but there is some on it. (96). Defendant's Exhibits A-1 and A-2 show a pair of wheels of the same kind as were on the truck at the time of the accident, and they are not solid disc wheels. They are spoke wheels. (96). Standing in a position two or three

feet from the wheel, there is no reason why you cannot see the floor on the other side of the wheel, if you were standing there looking at it. If you were working there, you might not be looking around. (96-97).

> "Q. In other words, you might not be thinking about what was going on at the particular moment?
>
> A. Well, you would be thinking what you were doing, yourself." (97).

W. E. McCARTY, a witness called on behalf of the plaintiff, testified as follows:

Direct Examination.

My name is W. E. McCarty. I live at Battleground, Clarke County, Washington. I am an electric welder. I was employed by the S. P. & S. in the roundhouse at Vancouver from September 12, 1923, until November 30, 1932. (119). I am familiar with the floor in the roundhouse at Vancouver. The general condition of the floor is practically the same all the time, so far as that goes. It is a plank floor and wears down fast, [47] hauling heavy loads over it all the time, and it is rough. (119-120).

The truck shown in defendant's Exhibits A-1, 2, 3 and 4, was bent several times and had been straightened out. I do not recall whether I assisted in making it. (120). I do not know for sure what purpose the truck was built for. I am fa-

(Testimony of W. E. McCarty.)

miliar with passenger locomotives used by the S. P. & S. They first acquired wheels of the sort shown in defendant's Exhibits A-1 and A-2—I could not say definitely, but it was in 1927 or 1928 when they installed the boosters on six hundred Class locomotives. I do not think that the S. P. & S. had that kind of wheels on its locomotives when this truck was built. (120-1). Immediately after it was built they hauled engine truck wheels on it. (121).

> "Q. What was the size and weight of those wheels as compared with the wheels shown in Defendant's Exhibits A-1 and A-2?
> . . . "

(At this point defendant objected, the objection was overruled and an exception allowed, as indicated in this bill of exceptions.)

> "A. Well, I have to just guess that. The pony truck wheel, I judge probably weigh, axle and all, wouldn't weigh over fifteen hundred pounds.
> Q. And how long was it after that truck was built before they started carrying the wheels shown in the exhibits referred to?
> A. Well——" (121).

(At this point defendant made the same objection, which was overruled, and an exception taken, as hereinbefore noted.)

(Testimony of W. E. McCarty.)

"Q. How long did the S. P. & S. have that skeleton truck before wheels of that type were carried upon it?

A. I couldn't state definitely that. [48]

Q. Well, approximately.

A. Well, that truck, if I remember right, was built when Mills came in there as foreman—general foreman. I couldn't state just when that was.

Q. Could you give us the year?

A. It might have been a year, I don't know."

I would not state the interval between the time of the building of the truck and the time when the railroad started carrying these big wheels on it. (122). I would say maybe six months or a year. It might have been a year and it might not have been. (123).

Cross Examination.

When wheels weighing four thousand pounds were placed on the truck, there is a tendency to spring down on the forward wheel with the weight in there. (124). The condition of the floor is not always exactly the same. They repaired the floor several times by getting down and breaking a plank out, but the general condition, it was rough, from 1923 to 1932. (125). The heavy trailer wheels such as are shown in the photographs came into use along about 1927 or 1928, and after that time the

truck had been used on many previous occasions for moving wheels of that type during a four or five year period prior to April 1932. (125). And while working in the shop, I have seen it used on many occasions for moving trailer wheels of just this same type. (125-126).

Redirect Examination.

Sometimes to move the trailer wheels, they would take the wheels in the drop pit and run them out through the roundhouse door on a track out in front of the roundhouse door, and run them back into the machine shop. (126). [49]

ROY BUTTNER, a witness called on behalf of plaintiff, testified as follows:

Direct Examination.

My name is Roy Buttner. I live in Vancouver. I was employed by the S. P. & S. from 1929 to 1932. I am very familiar with the condition of the floor in the roundhouse, and was familiar with its condition in April of 1932, at which time I was employed there. (127). I was on the laborers' crew as a sweeper, and it was part of my duty to sweep the floor of the roundhouse every day. The condition of the floor of the roundhouse was generally very rough. There were always depressions and elevations in it. Along the tracks they have metal plates that fit over the tracks so that the trucks can be put over them easily. (128). At the time

of the injury, the clearance of the truck unloaded was about an inch and a half. I cannot say what the clearance was when loaded with trailer wheels. It was very little. (129). The pictures of the truck shown in defendant's Exhibits A-1, 2, 3 and 4 were not taken at the location of the accident but were taken outside of the roundhouse. (129).

Cross Examination.

I was laid off by the S. P. & S. in February, 1932, and do not know what the conditions were in the roundhouse in April, 1932, after I was laid off. (129).

PRICE BUTTNER, a witness called on behalf of plaintiff, testified as follows:

Direct Examination.

My name is Price Buttner. I live at Vancouver, Washington. I was employed by the S. P. & S. as a laborer from 1929 [50] to 1932. (130).

I am familiar with the place in the roundhouse where the accident happened. Defendant's Exhibits A-1, 2, 3 and 4 were taken at a point three or four hundred feet from the place of the injury. I assisted in moving the truck and the wheels for the purpose of taking the pictures some time after the injury. (130-131). The clearance of the skeleton truck unloaded is about two inches, and when loaded with Trailer wheels, is about half an inch. (131-132). The pictures (defendant's Exhibits A-1 and A-2) do not reveal the correct clearance when loaded,

(Testimony of Price Buttner.)

because the floor shown in the picture is much better than the condition of the roundhouse floor. (132). When the pictures were taken we received instructions from Mr. Mills, the general foreman, to put the truck in the exact spot he wished it, with a knot under the front wheels which raised it half an inch, which would make the clearance a little better than an inch underneath the truck loaded. (132-133). I was one of a crew of about eight men engaged in moving the truck at the time of the injury. (133). At that time Harry Pickett had a bar under the back end of the truck and was prying. There were one or two men pushing from this back direction, helping hold the wheels on to keep them from rolling off. I was standing pushing on the rear of the back of the rear wheel on the right side. There were some men stationed on the left side between the two wheels. Martin, at the time of the accident, had his crowbar under the wheel, on the right hand side of the front wheel. Bill Morrison, the foreman, was standing right across on the left hand side, towards the fore part of the truck, about eight or nine feet from the flange of the wheels. (134). In that position he could see all members of the crew. I believe there was one man on the tongue. (135). [51]

On other occasions, two men were used on the tongue and they steered the truck. (135). On account of the weight, it is awfully hard for one man to handle the tongue alone over the rough

(Testimony of Price Buttner.)

floors, and on the tracks, and on most all occasions there were two men on the tongue to steer and the rest of us pushed. (136). To hold the wheels on the truck, most men kept hold of the wheels. There is a small flange that is cut in where the wheels can roll up, and the wheel rests on a small portion of the frame, which is all there is to keep the wheels on. (136). At the time of the accident, the truck hung up at this particular point because the floor is in bad condition and it was impossible to free the truck by pushing by hand. (136). The floor had been worn by heavy machinery going over it, and there is holes that is tore out. Where they sweep the floors, they sweep the slivers out, and that leaves the edge of the plank rotten underneath. At this particular place, the floor was both level and sloping. There was holes in the roundhouse wore deep enough to hold half a gallon of water, and it was on all angles, slanting, and some parts were spiked, and other parts were not. (137). At the particular point where the accident happened, there was quite a drop where the track ran through, and lumber was built up over it. The drop extended a foot and a half, sloping. On other occasions when the truck stuck, bars were used to free it by prying behind the truck, anywhere you could get hold of it. The bars were about six feet, some five feet long, and they have longer bars. The bars are of different shapes. They are made of steel. (138).

(Testimony of Price Buttner.)

On this particular occasion when the truck stuck, they gave us orders to all grab a hold and push while two men pried at the bars. (138). The foreman told Martin to grab a bar [52] and stick it under the front end. Martin was ordered to get a bar and place it in the position which he did. Martin was told to grab a bar. As near as I can recollect, the foreman said, "Martin, grab a bar and stick it under the front wheel." (139).

"Q. Did he or did he not indicate?——

A. He did.

Q. ——the precise place under the front wheel?

A. He did.

Q. With respect to the execution of that order, what did Leo do?

A. He did what he was ordered to." (139).

Wawell also went for a bar. I could not say whether he had returned before the accident happened. Pickett also had a bar. He was prying from the back end of the truck. (139-140). When Leo got the bar and started to pry, the truck, with the bars, and with some men pushing on it, gave way and caught Martin and threw him away from the truck. The truck kept going forward and Mr. Martin dropped down. Before the truck started, I was able to see Martin prying with the bar. (140). After Martin got the bar underneath, he was prying on the truck. Nothing unusual that I know of

(Testimony of Price Buttner.)

happened with reference to his prying before the truck was finally freed. After the truck was freed, it traveled about three feet before it stopped. When the truck started forward, the wheel caught Martin on the right hand side of the back wheel and twisted him around and threw him away from the truck. I asked Martin if he was hurt and he said "yes". I think Morrison asked him what was wrong. Morrison did not give any warning. (141). Pickett was the man with the bar behind. After Pickett took his position, nothing that I can remember was said by the foreman. Another method which was used in the roundhouse in moving trailer wheels other than the use of the skeleton truck, was as follows: [53]

When the wheels were lowered into the pit from underneath the locomotive, the train was backed up. Then the wheels can be rolled down the track, and there is a sidewalk and a large door on the passenger stall where the wheels can be rolled right out the door and put on another track. By following this track, two blocks, there is another track leads right into the lathe in the back shop where the wheels were going when the accident happened. (142). When the truck was stuck, and was freed with bars, it customarily traveled a short ways and again it would stick on the floor underneath the truck, and sometimes if they did not free it, it would move only three or four inches, and would travel, after being freed, the length of the pry un-

(Testimony of Price Buttner.)

derneath the wheel, just about the distance they had the bar to pry up on, and on the occasion in question, when Martin was hurt, it traveled about three feet. (143).

Cross Examination.

On this occasion, I was pushing behind because I had orders to, and I was pushing the truck to get it on its way to move it into the machine shop. That is what all of the crew were trying to do, to get it moving and keep it moving. That is the way it was usually done when the car stuck, we would all push on it and keep it moving; so that it was usual, after the truck was stuck on the floor, to keep it moving straight along if we could. (144).

"Q. But despite the fact that the customary way is for everybody to keep pushing on it and keep it moving, if they can, it usually stops in three inches. Did you ever push on it and keep it moving without stopping in three inches?

A. We did when the truck was going, and was not stuck.

. . . [54]

Q. I say, after a stop were you ever able, all pushing on it, to keep it moving?

A. Yes, sir.

Q. And that is what you were all trying to do, wasn't it, here?

A. Yes, sir. We were trying to get it to go again.

(Testimony of Price Buttner.)

Q. And you were trying to keep it moving into the machine shop?

A. Yes, sir." (145).

That is why I and the other members of the crew were pushing, trying to keep it going. (145). While Martin was in that vicinity with the bar in his hand, I cannot remember that he changed his position at all during the course of the work. (145-146). He was standing with his bar right under the wheel. I could not say whether his right hand was farther back on the bar. I do not remember whether his right foot or his left foot was forward. The bar was about six feet long. (146). I do not know the distance between the two trailer wheels. I do not know that the gauge of a standard railroad track is 56½ inches. I do not remember whether the distance between the wheels was more or less than the length of the bar. I cannot remember whether, as Martin stood with the bar, the bar extended out beyond the side of the rear wheel, or whether it was entirely inside between the two wheels, and I cannot say whether the bar was between Martin and the axle, or whether Martin was between the bar and the axle. (147). When the accident happened, he dropped out sideways. He did not drop forward and hit the front wheels with his hands. He just fell right to one side. (147). I could not say whether he fell clear to the floor. I was watching him enough to know that he was hurt, but I was not watching him

(Testimony of Price Buttner.)

carefully, but I saw that he fell to the side. I was attending [55] to the work and was not looking in his direction. I was right behind him pushing, but he was three feet in back of us when the wheel stopped. (148). When the wheel started, he was right in front of me and I was leaning down, with my hands out, pushing on the rear wheel, and on the other side of that rear wheel was Martin, about four feet ahead of me. (148). The wheels moved about three feet before stopping. (149).

> "Q. About three feet. All right, Martin was four feet ahead of you, and the wheels moved three feet, and you said when the thing was all over, Martin was three feet behind you?
>
> A. He was where I couldn't see him.
>
> Q. Didn't you see him fall out there?
>
> A. I was not watching him." (149).

I saw him drop out, knocked out. He went down to his knees. I said he went down on his knees. (149-150).

When the pictures, Defendant's Exhibits A-1, 2, 3 and 4, were taken, Mr. Mills did not tell the crew to get the rear wheels out of the puddle, out of the low spot in the floor. (Counsel was then referring to defendant's Exhibit A-1). (151). Morrison, at the time, was standing to the left hand side. There was some one pushing on that side between Martin and Morrison. I don't remember how he was stand-

(Testimony of Price Buttner.)
ing when Martin was doing the work. (151). I believe that he had his shoulder to the flange of the wheel, but I am not sure of that, and I cannot tell whether he had his shoulder or his hands up. I was not paying much attention to him. That is the way they generally push, and I do not know how he was standing. (152).

When Martin fell, I cannot say whether his hands hit the floor. (152). I attended an investigation relating to this accident on January 9, 1933. At that time questions were put to [56] me in the presence of a stenographer and my answers were taken down. Later I was shown a sheet of paper with questions and answers on it, and I signed it. The paper now shown me bears my signature, M. P. Buttner, and are the two pages of the statement which I signed. (153). (Document referred to was thereupon marked for identification.) I cannot remember whether at that time I was asked the question to which I answered as follows:

> "Q. Was there anybody present in charge of the work at the time of the accident, that you know of?
>
> A. At that time foreman Morrison was in charge of the job, and he had gone ahead to open a machine room door." (154).

At the time of the investigation, I was giving my best recollection of what happened at the time of the accident, and my recollection at that time was

(Testimony of Price Buttner.)

as good as it is today. I cannot remember whether I was then asked a question:

> "Q. Did anybody tell Martin to use the bar at the place he did use it?"

or whether I answered thereto:

> "A. No." (155).

At the time of the investigation, I was asked the question:

> "Q. You have had considerable experience in moving wheels, have you not?"

to which I answered:

> "A. I have had my share."

I remember that quite well. (155-156). At the time of the investigation, I was asked:

> "Q. What would be the proper manner to unloosen the wheel cart that was stuck the way this one was?"

to which I answered:

> "A. By prying from the rear of the cart." (156).

I do not remember whether, at the time of that investigation, [57] I was asked:

> "Q. Was there any reason why Martin couldn't have placed his bar at the rear of the truck at that time?"

(Testimony of Price Buttner.)

or whether I answered:

"A. No, there wasn't." (156).

I do not think that I was asked that question. This is the first time that I have seen the paper marked defendant's Exhibit A-5 to read it. After refreshing my recollection, I testify that I was not asked the question:

"Q. Was there any reason why Martin couldn't have placed his bar at the rear of the truck at that time?"

and I did not answer:

"A. No, there wasn't."

This paper, defendant's Exhibit A-5, was signed after the time that I was asked the questions. I do not remember whether a stenographer was present in the room at the time the questions were asked. I could not say how long after the questions were put that I signed the paper. I signed it at the rip track office. Mr. Mills asked me to sign the paper. (158). At the time I signed it, just Mills and I were present. I did not read it over at the time. I just signed any paper that Mr. Mills put in front of me. I did not look at the paper to see what I was signing. Defendant's Exhibit A-5 contains the papers that I signed at that time. (159). (Defendant's Exhibit A-5) reads as follows:

(Testimony of Price Buttner.)

"Statement of M. P. Buttner, Laborer, regarding the injury to L. H. Martin, Laborer, at Vancouver, April 22, 1932.

Vancouver, Jan. 9, 1933.

Stamped
Clark Co. Wn.
Case No. 14184
Defendant's
Identification No. 1 [58]
10-31-33 O. C.

Mr. J. D. Foley, Assistant Claim Agent, questioning.

Q. You were with Martin at the time he was injured?

A. I was.

Q. Just state what you were doing before the time of the accident.

A. We picked up a pair of trailer wheels at pit No. 10 and loaded them on a wheel cart to transport them to the machine shop. This wheel cart is constructed of steel and built very low to the ground so that the heavy wheels can be handled. There were five or six men on the ground at the time. The bottom of the wagon stuck about at the entrance to back shop but we released it by pushing without the aid of a bar. Then when we arrived at a point between pits 3 and 4 about in front of the clock, the bottom of the wheel cart came in contact with a high place in floor and we could not move it by

(Testimony of Price Buttner.)

pushing so Martin secured a bar and placed it under the forward trailer wheel on the right hand side of the cart and he used this bar to pry the wagon forward. His position at the end of the bar would place his foot almost against the rear trailer wheel and his prying and our combined pushing rolled the cart from where it was binding the rear trailer wheel and struck the man on the back of the left foot and ankle.

Q. Was there anybody present in charge of the work at the time of the accident that you know of?

A. Foreman Morrison was in charge of the job and he had gone ahead to open the machine room door.

Q. Did anybdy tell Martin to use the bar in the place where he did use it?

A. No.

Q. How long have you been working for the company?

A. A little better than two years.

Q. You have had considerable experience in moving wheels, have you not?

(end of page 1).

A. I have had my share.

Q. What would be the proper manner to unloosen a wheel cart that was stuck the way this one was? [59]

A. By prying from the rear of the cart.

(Testimony of Price Buttner.)

Q. Was there any reason why Martin could not have placed his bar at the rear of the truck at the time?

A. No, there wasn't.

Q. Was it anything unusual for the wheel truck to get stuck?

A. No. Every trip occurrence. The body of the truck is built so low it naturally springs down when loaded so there was only an inch clearance on the level and any raise in the floor over this would catch the bottom of the truck.

Q. Was there any extra heavy lifting on Martin's part to dislodge this cart from where it was stuck?

A. All the lifting that would be done would be done on the bar. I don't think it would be very hard lifting on it. Martin had no more than gotten his bar placed before the cart dislodged and moved forward.

Q. Was Martin thrown off balance or thrown down at the time that this happened?

A. No.

Q. Did he complain at the time of any injury to his back?

A. No.

Q. What did he say?

A. He was limping. He didn't help push it any further.

(Signed) M. P. Buttner."

Redirect Examination.

At the time the questions were put to me (in defendant's Exhibit A-5), I was at the rip track office near the roundhouse. I was ordered there by the general foreman and was there about ten minutes. I do not know the party who asked the questions. He was some one from Portland. His relation to the railroad was not disclosed to me. J. I. Mills, general foreman, [60] was also there. I don't remember whether there was a stenographer present. The paper was not written up at that time, but it was two or three weeks later that I signed it. The general foreman ordered us all to go down and sign it. (162). At the time he told us to go to the office and sign the paper they had written for us. There were about three in the office when I was there. They put the papers out in front of us to sign and we signed them. No one representing the company said anything to me at that time. I did not read it before signing. I was not asked to read it and it was not read to me, and I didn't know what the contents were. It was either sign it or lose our jobs. (163).

When the truck started forward and moved the distance which it did at the time of the accident, I was not surprised at the distance it traveled. (163).

At this point the plaintiff rested.

WILLIAM J. MORRISON, a witness called on behalf of defendant, testified as follows:

(Testimony of William J. Morrison.)

My name is William J. Morrison. I am employed by Spokane, Portland and Seattle Railway Company and have worked for the company since October 6, 1922. I work at the Vancouver roundhouse. In April, 1932, I was employed at the roundhouse as roundhouse foreman. (164). I had been roundhouse foreman since September 1, 1923, continuously up to and after April 22, 1932. As roundhouse foreman, I was familiar with the service to which engine No. 622 was put from time to time because I have the despatching of them. (165). In the spring of 1932, engine No. 622 was used mostly on passenger work, but it was available for other service in the spring of 1932. (165). I know of my own knowledge that before April 22, 1932, Engine No. [61] 622 had been used for service other than passenger train service and know that after that date it was used in service other than passenger train service. (165-166). It was used in local freight service and in stock service. Local freight service means a train that goes out to handle the local freight along the line between Vancouver and Wishram. Between Vancouver and Wishram the line of the S. P. & S. Railway does not lie outside of the state of Washington. (166). At Camas, Washington, is a paper mill and a woolen mill right at the edge of town. Prior to April 22, 1932, engine No. 622 had been used in freight service locally between Camas and Vancouver, Washington. We have used that engine to go up there when our local was

(Testimony of William J. Morrison.)
late to bring in freight from this paper mill when it was required. (166). Because of our local train being late, we would have to go out and bring in this freight in order to connect with the Great Northern connection in our yards for movement north to Seattle. The Great Northern line from Vancouver to Seattle does not lie outside of the state of Washington. (167).

The accident to Mr. Martin when he was assisting in moving the cart occurred about 9:30 in the morning. Engine No. 622 was in the roundhouse at the time. It was not in condition to perform transportation service because I had removed these trailer wheels to have the tires turned on them, and I had made a number of other repairs on the engine at that particular time that I was just completing. (167). At that time, when the trailer wheels were being moved, the engine had not been assigned to any further service. I usually make all my assignments for engines in the afternoon around 4:00 o'clock, because we have no engines running out of there for freight or passenger service that leave before 6:00 o'clock in the evening, and at 4:00 o'clock in the afternoon I get in touch with the [62] despatcher and see what trains he has lined up, and then the regular trains, I make the assignments for the engines and notify him at that time of what engines I am using. (168). Engine No. 622 was not assigned to any future service at the time that Martin was working, as described in his testimony,

(Testimony of William J. Morrison.)

and at that time I did not know what the next service of engine No. 622 would be. (168). I was the man in charge there that had the duty of assigning engines to particular work at that time. (168).

In the roundhouse there are 20 stalls, but not all of them have drop pits. One cannot very well remove a pair of wheels from an engine at any stall other than over a drop pit. At the time of the accident described by Martin, Engine No. 622 was at stall No. 10. It is a drop pit. (169).

We have a track outside of the roundhouse that runs around the house that we can take these wheels out over, and we cut them over on to the other track and we can get them around to the machine shop. On a number of occasions I have moved wheels from pit No. 10 to the machine shop over that track.

Out at the entrance of the machine room, I had a storage track and I would run the wheels out that way when I was not going to replace the same wheels, and then at the first available opportunity I would repair these trailers in the machine room and set them back out on this little track. When I did it that way I would use this track out through the outer end of the roundhouse, and I would bring my other wheels back the same way after I had removed them. That is, when I had available wheels to apply. (170). At the time these trailer wheels from No. 622 were removed, I was taking them to have them turned on account of shelling

(Testimony of William J. Morrison.)
of the tread of the tire, [63] and I intended, after turning, to reapply them to the same engine. (171). When I intended to reapply the wheels at completion of repairs, it was not a practice to use the track I referred to, because I lost too much time going around that way for one reason. I would have to take them back in the machine room, and usually I had rods and pistons and various other parts of machinery in the machines, and it would be in the way to go in with the trailers, so when I was reapplying them right back to the same engine I would use this cart that was built, and take them right down through the floor in the roundhouse. (171).

This cart was built in 1927. I had the idea—I thought we ought to have it. (171). I did not design the truck. At the time the cart was built, we had engines that were built in 1925 that had trailer wheels that were 600 pounds heavier and five inches bigger in diameter than these particular wheels that were under No. 622. This cart was built after 1925, when those larger trailer wheels were in use. In 1927, when the cart was built, it was used to handle trailer wheels, tender wheels, and engine truck wheels, and was used to handle wheels as large as those I spoke of, which weighed 600 pounds more than the trailer wheels on No. 622, right from the beginning. (172).

The wheels on No. 622 weighed 4700 pounds new, and the tires at that time were two and a half inches thick, so we turned an inch off the tread of the tire

(Testimony of William J. Morrison.)

and I would assume they would weigh 4350 pounds. The outside diameter was 48½ inches. The distance between the flanges was 53¼ inches. The axle was nine inches in diameter. The overall length of the axle from one end of the journal on the outside of the wheel to the other end of the journal on the outside of the other wheel was 84 inches. That is the extreme length of the axle. (173). [64] The channel iron on the truck was a 12 inch channel, with sides 3½ inches high. The metal in the bottom of the channel was 13/16 inch thick. (174). We used the truck continuously from the time it was built up until April, 1932, if we had to haul wheels. (174). There would be intervals of a week or two weeks when we would not use it at all, but whenever it was necessary to change wheels, we used the truck where we had to put the same wheels back again. (175). At the time of the accident, the truck was located right in front of the time clock at the first pit, that is, the first track entering the back end of the machine room. (175). Martin went to work there August 16, 1929, and worked up until April 22, 1932. He was employed as a laborer and engine wiper. I used him wiping engines, helping to haul material around from the roundhouse to the machine room, unloading sand cars, cleaning cars, and cleaning cabs of engines. Some of the work was heavy and some was light. I know that during the interval he was employed, he had assisted in moving the cart with wheels on it before

(Testimony of William J. Morrison.)
the time of the accident. (175). The floor of the roundhouse is four by twelve planking, and is placed parallel with the building in the runways and parallel to the pits along the stalls throughout the roundhouse except up at the boiler house where we used the dirt floor. The runway is the back end of the roundhouse, that is, back from the doors through which the engines come, and is the space between the head end of the engines and the back wall. (176). The planks paralleled the runway. The floor was rough. Where it had been spiked down the spikes showed in places and probably raised an eighth of an inch. The knots in the timber would show. It was splintered from hauling trucks over it, electric welders and heavy material. (176-177). Near the point where the accident happened, there are two tracks leading into the machine room, one [65] on each side of the wheel lathe. From the rail nearest the point where the truck stuck, back to the position of the truck as it was stuck, the planks had been cut off or tapered. There was about a half inch difference in the height of a 50 pound rail and a four-inch plank. A 50 pound rail measures three and a half inches high, and a four-inch plank four inches, and the planking was set right on to the ties, so the rail was half an inch lower than the plank floor, so they tapered off each plank half way across them so it would meet the same height of the rail. That is, half the width of the plank, so that the bevel would be six inches

(Testimony of William J. Morrison.)

wide on each plank on each side of the rail, and the groove thus formed would be approximately 14 inches clear across. (177-178). I was in the vicinity of the truck at the time of the accident; prior to the accident I had left the truck as it was moving along and had gone ahead to open those sliding doors into the machine room so that by the time they got down there we could roll the wheels off on to the track and roll them into the machine room and pick them up with the hoist and put them in the machine, and I had gone ahead to open the doors. As I got the doors open and came back, the truck was still moving forward, in fact I no more than got the doors open when they were practically right behind it with the truck. (178). I did not see the accident that Martin tells about. (178-179). I did not give any order to Martin to get a bar and move the truck, and I did not give any order to any of the crew working on the truck to get a bar. (179). I have seen bars used on occasions in moving the truck, not very often. If they all pull and push, it is not necessary, but I have seen bars used on other occasions. It was not necessary to give orders with respect to the use of bars. The work Martin was doing was not different generally than that usually done by him around the roundhouse. [66] He helped on trailers, engine trucks, and tank wheels, just the same as the rest of them when it was required. (179). When I got back to the truck after opening the doors, Martin was still working. The

(Testimony of William J. Morrison.)
wheels were then taken to this track, rolled off the wagon into the machine room, and raised up with the hoist and put in the lathe. Martin continued to work in that operation. The first I noticed of any injury to Martin was when they were raising the wheels up, Martin was limping around and I asked him what was the matter and he said he hurt his foot, his left foot. (180). Martin was carried on the payroll as a laborer. (180).

Cross Examination.

I started in the railroad business in 1910 with the Great Northern, and have been at it continuously since except the time during the war. (180). I started with the S. P. & S. in 1922 as a machinist in the Vancouver roundhouse. I fixed 1927 as the time when the truck was built because I took care of all the wheels there and I know when this truck was built. I havent the record with me, but I have a record of it. It was made in the shops in February of 1927. The general foreman and I figured out the design. I knew what I wanted and I asked him to build it for me. (181). From my experience, and the general foreman's experience, we both know the stress of any metals required or we couldn't very well hold the positions that we have. (181-182). We tested it with a load consisting of wheels weighing 5100 pounds when it was first built. The truck did give some, it gave way five-eighths of an inch. This was the only truck of that type we

(Testimony of William J. Morrison.)

had at the roundhouse, and prior to February, 1927, we had no truck. We had a different arrangement for taking care [67] of wheels. (182). At the time of the injury in April, 1932, the truck was not sprung at all. The channel kept the wheels from rolling off and I did not have men to hold them on with their hands and they did not hold them on on this occasion. (183).

This engine was not used in local freight in April, 1932. It was used once in that service in the first part of May, 1932, and then used in the latter part of May. We made a couple of trips with it with stock trains. I could not tell how many times it was used in March, 1932, or in February, 1932, but I know that it was used whenever it was required. (184). The occasions when it was assigned to pick up local freight were emergencies only, that is all. I used to take the relief engine or the extra passenger engine I kept there. It was always kept ready to go, and I would use whichever one I had for emergency work. The general use to which it was put was hauling trains Nos. 1 and 2 between Portland and Spokane. (184). The repairs on this particular occasion were running repairs rather than general repairs. (184). I could have transported these wheels over a track rather than using the skeleton truck, but it would not necessarily be a safer way. I used the truck on this occasion because I had no extra pair of trailers for the engine. There were only five of

(Testimony of William J. Morrison.)
those engines and I just had five pairs of trailers, so that if I made any repairs on those trailers, I had to make them and put them back on the engine, and naturally I took them in the machine room the way I could get in there without delay to get the repairs made and get the wheels back to the engine. (185). To move the wheels on the track, I used eight men—six or eight. I used the same force on the truck. (185).

(Thereupon certain questions were propounded to the wit- [68] ness by the court, and he testified as follows:)

These trailer wheels were removed from the engine the morning of April 22, 1932, and I was taking them to the machine to have the tires turned. After they were taken out, they were put on the truck within fifteen minutes, long enough to back the engine off of the pit. We have what they call a "drop pit." We let the trailers down into the pit in the ground, and then raise them up in the air and roll them out to the edge of the pit, and this wagon was used. It would stand at the front end of the pit and we would roll them right on to the wagon. (186). It would take about five minutes from the time the engine wheels were taken from the engine until they were on the truck. I had the crew there before I dropped the trailers. (186-187). I used the same six or eight men to complete the movement to the machine shop, all except this man that

(Testimony of William J. Morrison.)

was injured. We have seven men assigned to the roundhouse who do nothing but sweep floors, wipe engines and clean cabs. (187). None of the seven men helped to take the trailer wheels off the engine —that was machinists' work. As soon as we had the engine away, I used the laborers to do the necessary labor work. They helped to get the wheels on the truck, and it was one continuous movement from the time they were putting it on the truck and moved the truck to the machine shop. (187). I would say it took about fifteen or eighteen minutes, and apparently during that movement plaintiff was hurt. (188).

(Thereupon further questions were asked of the witness by counsel for plaintiff.)

I could not say whether, in this local freight service, the cars had interstate bills of lading. I know that at the paper mill we had taken them up and brought them in here to go on the Great Northern to Seattle. Of course where they are [69] billed from there, I don't know. I could not say whether, on other occasions, there were cars being handled in interstate traffic. I presume there was freight in those cars with interstate bills of lading. (188).

Redirect Examination.

The paper and pulp cars referred to were billed for movement to Seattle. (188).

Recross Examination.

We ran to Camas just to get pulp cars at the paper mill whenever our westbound local would be late and these cars would not make the Great Northern connection. As Camas is only 15 miles from Vancouver, they would call a crew to go out and bring in this merchandise to put it on this Great Northern freight. (189).

DAVE REEDER, a witness called on behalf of defendant, testified as follows:

Direct Examination.

I work for the S. P. & S. in the roundhouse. I am carried on the payroll as a laborer. I was working in the crew with Mr. Martin in April, 1932. When we were in the neighborhood of the time clock, I was working on the right hand side of the wheel, right behind Martin. (190). He was working on the front wheel on the right side of the axle. I saw Martin pick up a bar. I did not hear the foreman direct him to get a bar, but he used it. I have worked on wheels on other occasions, while wheels were being moved on that truck. We used bars every [70] once in a while. As the truck was proceeding, it was stuck. I think Wagnell went for a bar, but I don't think he got back with it.

"Q. Did you see Mr. Martin get hurt?
A. No.
Q. Did he fall?
A. I didn't see him fall." (191).

(Testimony of Dave Reeder.)

But I did see him use a bar. I did not see him get his foot caught, and cannot say whether he did get his foot caught. (192). Other members of the crew were Pickett, Hodson, Wagnell, and one of the Buttner boys, I don't know which one. Pickett was right next to me in the middle of the back wheel. Hodson was working on the lefthand side of the back wheel. I don't know whether anybody was working on the front wheel on the left side of the axle. (192). I have seen Martin working, moving wheels with this truck, several times before the accident.

Cross Examination.

I have worked for the S. P. & S. since May 13, 1925, and am still working for them. I have worked on this truck many times. At the time of the injury, the truck was not sprung, that I know of. I think it was in perfect condition. I do not know of its being repaired shortly after the injury. (193).

I have discussed this case with the lawyer here, not very many times. (193-194). There was nothing other than the side of the channel iron to keep the wheels on the truck. The men did not have to hold the wheels to keep them from rolling off. There was no danger of the wheels rolling off. (194). On one occasion, the truck broke through the floor—the floor broke, not in this runway, but on the side road there where [71] there was a rotten place and they pieced the board over, and the wheel went through and hurt me. The floor had

been repaired before the Martin accident, but he was not hurt where I was. I don't know how long before Martin was hurt the floor was repaired. The whole floor was repaired throughout the roundhouse. (194). It was in pretty fair shape at the time Martin was hurt. (195).

> "Q. Now, isn't it a fact that the floor was repaired right after Mr. Martin was hurt, on account of his injury?
>
> . . . . . .
>
> Q. Now, isn't it a fact that this floor was repaired in this particular place right after this injury?
>
> . . . . . .
>
> A. I can't say whether it was right away. It was repaired. What I mean, where I was hurt, not where he was hurt." (195).

HARRY D. PICKETT, a witness called on behalf of defendant, testified as follows:

My name is Harry D. Pickett. I work for the S. P. & S. at Vancouver in the roundhouse, and was working there in April, 1932. I was one of the crew that was working to move the trailer wheels on the truck when Martin had some accident. (196). The truck stalled there in front of the tool room first, and then we pushed it off there, and then it stalled down there at the time clock. (196). In front of the tool room we pushed it off without a bar. When it stalled in front of the time clock,

(Testimony of Harry D. Pickett.)

Martin and Wagnell went to get a bar. Wagnell did not get back before the truck got moving. I did not hear Morrison or anybody else instruct Martin to get a bar. I was working right behind the hind axle, right on the back end of it. I was pushing on it. I did not have a bar. Nobody that I know [72] of had a bar at the rear end. (197).

Dave Reeder was back there with me. (197-198). I was trying to push the wheels on ahead. I did not see the accident. I did not see him get struck in the foot by the wheel. I did not see him fall down. He did not fall down that I know of. (198). After it was stalled in front of the time clock, Martin went down with us to the machine shop to the wheel lathe. He helped us put the wheels in the lathe, and I went back to work. I don't know after that whether Martin stayed or not. (198). I had worked with Martin before on this truck moving trailer wheels, I don't know just how many times, but every time, pretty near, that one was moved, the laborers had to move them, and we were all called to move them. (198). There was nothing unusual on this particular trip. We had to take them up through the aisle right along. Once in a while when taking them up there, they would stick on the floor and we had to loosen them with a bar, and sometimes we would not.

Cross Examination.

I am still working for the S. P. & S. I could not swear that Martin was not hurt on this occasion

when the truck stalled. I did not see it. I did not see the accident. (199).

ERWIN E. HODSON, a witness called on behalf of defendant, testified as follows:

My name is Erwin E. Hodson. I work for the S. P. & S. at the roundhouse in Vancouver, and was working there in April, 1932. I was one of the crew engaged in moving the pair of trailer wheels which have been referred to. I remember the truck with the wheels on it being stalled near the time clock. (200). [73] As near as I can remember, I was at the back of the truck on the left side pushing. I was attempting to move the trailer wheels to the machine shop and push the truck over. (201). I do not remember whether Martin got a bar. I do not remember instructions from any one telling him to get a bar. I did not see the truck strike him. Shortly afterwards he told me it had run on his heel, but I did not see it happen. I did not see him fall. I never saw him, really. I saw him afterwards when he was standing by the window, that is what attracted my attention to it. (201). It seems to me that he accompanied the truck down to the machine shop, but I couldn't guarantee it. (201-202). The runway is made of planks, and from use, the knots will stand up and the nails will stand up a little. It is passable. You can run trucks over it without dumping anything off, but it is a little rough and the splinters are up some. The condition of the floor in front of the time clock was about the same as in other parts of the runway.

Cross Examination.

I am still working for the company. (202).

At this point defendant rested.

Thereupon plaintiff called a witness in rebuttal.

ROY BUTTNER, who had previously testified, was called on behalf of plaintiff and testified as follows:

Direct Examination.

In my previous testimony I made an error which I desire to correct. I went to work in the S. P. & S. shop on May 14, 1929, and left the employ in February, 1933. (205). [74]

Thereupon the witness was asked:

> "Q. Do you know when the floor in front of the clock where this accident happened was repaired?"

to which the defendant objected, the objection was overruled, and an exception taken, as previously set forth, and the witness answered:

> "A. It was repaired some time after the accident." (206).

Cross Examination.

I do not know when, after the accident, it was repaired, but it wasn't as long as six months. (207).

PRICE BUTTNER, a witness who had previously testified, was called on behalf of plaintiff and testified in rebuttal as follows:

Direct Examination.

The witness was asked:

"Q. With reference to the occurrence of this accident, do you know when the floor at that point was repaired?"

to which the defendant objected, the objection was overruled, and an exception taken, and the witness answered as follows:

"A. A short time after the accident." (208).

Thereupon the plaintiff rested.

After the ruling of the court upon defendant's motion for dismissal upon the ground that the federal court had no jurisdiction to hear the case, and after the ruling of the court upon defendant's motion for a directed verdict, all as set forth hereinbefore, and after the argument of counsel to the jury, the court proceeded to instruct the jury. [75]

The following is a complete statement of all of the instructions given by the court to the jury:

"You have heard the testimony in the case and the arguments of the attorneys. The Court will instruct you upon the law of the case and you will then retire to consider the verdict to be returned.

You will take with you to the jury room the pleadings at the conclusion of the Court's instructions. These pleadings form the issues by the allegations therein made concerning the facts in the case—the facts of the case. You will have these pleadings with you in your jury room during your deliberations and can examine them if you find it necessary.

The first pleading filed is the plaintiff's complaint. In that he alleges his employment by the defendant and alleges the defendant was negligent in certain particulars in the method adopted in moving the trailer wheels; that it was further negligent in maintaining the platform or decking in an unsafe and wornout condition, and using a truck, the side of which was sprung and in failing to warn the plaintiff of the danger of the truck slipping forward, and in directing the plaintiff to work in the position where he was injured. He further alleges that such negligence was the proximate cause of his injury. In his complaint, plaintiff describes the nature of the injuries which he received and alleges the amount of damages resulting therefrom, for the recovery of which he sues.

To that complaint the defendant has filed an amended answer which you will also have in the jury room. In this answer, the defendant denies that it was negligent in any of the respects alleged by plaintiff; denies that such

negligence was the proximate cause of his injury, and denies the amount of the alleged damage. The defendant further sets out in its amended answer four separate affirmative defenses, the third and fourth of which the Court instructs you, as a matter of law, to disregard. In the first of these further separate affirmative defenses the defendant alleges that the plaintiff himself was negligent, particularly in using a bar, knowingly and unnecessarily placing himself in a dangerous position at a time when plaintiff knew that said wheels were to be moved.

The defendant further alleges that these negligent acts of plaintiff caused or contributed to cause the injuries, if any, which he sustained. [76]

In a further second affirmative separate defense, defendant alleges that at the time and place plaintiff sustained injuries, if any, of which he complains, plaintiff assumed the risk of such injuries, in that the dangers incident to the movement of said wheels, and the use of the bar in the manner adopted by plaintiff, were open and apparent and were known and appreciated by plaintiff, or should have been known and appreciated by him if he had used his ordinary powers of observation, and further alleges that the risks thus assumed caused or contributed to cause the injuries, if any, of which plaintiff now complains.

By plaintiff's reply, he denies these allegations contained in the first and second separate affirmative defenses.

You are now called upon to determine the issues made by these allegations and denials.

The burden rests upon the plaintiff of showing by a fair preponderance of the evidence, all of the material allegations of his complaint that are denied by the defendant.

There is, so far as the burden upon the plaintiff is concerned, in the matter of evidence, one exception to this. He alleges that the injury to his back, spine, and sacroiliac and pelvic regions is permanent, causing him to become nervous, unable to sleep at night, and to suffer considerable pain, and to be unable to follow his usual vocation.

Insofar as the permanency of his injuries are concerned, insofar as future pain and suffering and future disability are concerned, the burden rests upon the plaintiff of showing the same by evidence to a reasonable certainty, rather than by a mere preponderance of the evidence.

Insofar as the allegation of contributory negligence is concerned, the burden rests upon the defendant of showing by a fair preponderance of the evidence that plaintiff was guilty of contributory negligence.

Concerning the burden as to the defense of assumption of risk, I will instruct you later.

The statute provides: Every common carrier by railroad while engaging in commerce between any of the several States shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for such injury—and this is the part that the Court wishes particularly to call to your attention—resulting in whole or in part [77] from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Well, now, the roundhouse, machine shop, and the decking of the platform about them, the Court instructs you are a part of the defendant's works, and that this truck was one of its appliances.

Passing to the allegations by plaintiff of defendant's negligence, you are instructed that an employer, in this case the defendant, is not bound to provide a place that is absolutely safe in all respects for the employee, nor is the employer bound to use the best and safest method of work or the best and safest appliances used therein. The employer is not an insurer of the safety of its employees. You are further instructed that you have no right to assume, merely because the plaintiff was injured, that the defendant was negligent.

It is, however, the duty of the employer to provide the employee, the plaintiff, with a reasonably safe place to work and to pursue a reasonably safe method in doing its work and to provide its employees with reasonably safe and suitable appliances with which to do the work required. This duty an employer is positively bound to perform in the first instance. He cannot be excused from its performance by intrusting it to another charged with the duty to make performance for him—for it, but who neglects to discharge that duty.

The employer is further under obligation to keep the place in which, and the appliances with which the employee is required to work, in a reasonably safe condition. If the defendant failed in any of these respects in the present case it was negligent.

Passing to the allegation of the answer that the plaintiff was guilty of contributory negligence, you are instructed that the plaintiff was under the duty of exercising ordinary care for his own safety. If he failed to exercise ordinary care for his own safety, and that failure was the proximate cause of his injury, he cannot recover full damages for such injury, even though the defendant was negligent, and even though its negligence was a proximate cause of such injury.

If the negligence on the part of the plaintiff was the sole cause of such injury, he of course

cannot recover in any amount. [78]

In the foregoing instructions the Court has used the word "negligence" and the expression "failure to exercise ordinary care".

Negligence as here used, means the want of ordinary care. This might be either in failing to do something that an ordinarily careful and prudent person would have done, or in doing something that an ordinarily careful and prudent person would not have done. Ordinary care is the care that an ordinarily careful and prudent person would exercise under the same circumstances, and should always be proportioned to the peril and danger reasonably to be apprehended from a want of proper prudence.

The defendant alleges that the plaintiff assumed the risk of his injury. The law relating to the assumption of risk applicable to this case is as follows:

The servant employee assumes all risks ordinarily and naturally incident to his employment, and all extraordinary risks which he knows and appreciates, but not such as are due to the negligence of the employer until the employee becomes aware of the negligent act and appreciates the danger arising out of it, unless the negligence and danger were alike so obvious that a person of ordinary prudence in his situation, making a reasonable use of his facilities, would have known of the condition

creating the danger and appreciated the danger.

"Obvious" as here used, means plainly apparent.

Regarding the burden of proof touching assumption of risk, the burden rests upon the plaintiff of showing that his injury was not caused by a danger ordinarily incident to the employment in which he was engaged.

The burden rests upon the defendant of showing that the plaintiff knew of the defendant's negligent acts and appreciated the danger arising out of such negligence on the part of the defendant, of which he complains or that they were so plain, obvious and apparent that the plaintiff should have known them and appreciated the danger arising from them.

Regarding plaintiff's allegation that defendant was negligent in failing to warn plaintiff of the danger he claims to have existed, the defendant would not have been negligent in that respect if the danger was so obvious and apparent that a person of ordinary prudence, in the situation in which plaintiff was making a reasonable use of his [79] faculties, would have known of the conditions and appreciated the danger arising from them.

In the course of these instructions the Court has used the expression "proximate cause". Proximate cause is the moving, efficient cause; that cause which, moving in direct sequence,

uninterrupted by any new and efficient cause, produced a result, and without which it would not have occurred.

The Court has used the expression "preponderance of the evidence". A preponderance of the evidence is the greater weight of evidence. That evidence preponderates which is of such a nature as to create and induce a belief in the mind. Where there is a dispute in the evidence, that evidence preponderates which creates and induces a belief in the mind, in spite of opposing evidence.

In taking up the issues submitted to you, the law does not require you to take them up in any particular order, but it would appear logical to approach them in the following order:

First, has the plaintiff shown by a fair preponderance of the evidence that his injury was caused in the way he says it was caused. That is, by being struck and thrown by the rear trailer wheel. If he has failed to show that by a fair preponderance of the evidence, there would not be any occasion for you to consider the case further. You should stop in your consideration of it and return a verdict for the defendant, for in such case the plaintiff would have failed in his proof.

If, however, he has sustained the burden of proof upon this question and shown, by a fair preponderance of the evidence, that his injury

was caused in the manner in which he states, you would next consider this defense of the assumption of risk.

Has the defendant shown by a fair preponderance of the evidence that plaintiff's injury was caused by one or more of the dangers ordinarily incident to his employment, or that the alleged negligent acts of the defendant, at the time and place plaintiff claims to have been injured, were known to the plaintiff and the danger arising from them appreciated by him, or, has it been shown—so shown by a fair preponderance of the evidence that they were so apparent and obvious that plaintiff, making the use of his faculties that an ordinarily careful and prudent man in his situation would have made, would have known of them and appreciated the danger arising from them? If the defendant has, by a fair preponderance of the evidence shown either you would again stop in your consideration of the [80] case and return a verdict for the defendant, because the defendant would have made out its defense of the assumption of risk which would defeat plaintiff's recovery.

If, however, there is no fair preponderance of the evidence so showing, you would then consider whether the plaintiff had shown by a fair preponderance of the evidence that the defendant was negligent in one or more of the respects alleged by him. If the plaintiff has

failed to so show by a fair preponderance of the evidence, you should stop in your deliberations and return a verdict for the defendant because the plaintiff would have failed in his proof.

If, however, he has sustained this burden, you would next consider whether the plaintiff has shown by a fair preponderance of the evidence that at least one of the acts of negligence with which he charges the defendant was the proximate cause of his injury. If plaintiff has failed to so show by a fair preponderance of the evidence, he is not entitled to recover.

If, however, you decide the foregoing issues in plaintiff's favor, you would next consider the damage caused plaintiff by the injuries proximately caused by that negligence of which plaintiff has accused the defendant. If you find that such negligence on the part of the defendant was the sole cause of plaintiff's injury, you should award plaintiff such sum of money as damages as will fairly and justly compensate him for such injuries described by him in his complaint as were proximately caused by defendant's negligence. In so doing, you should take into consideration the nature and character of plaintiff's injury, whether it is permanent or temporary; wages lost by him on account of such injury; any pain and suffering he may have endured; and from all these matters—may have endured, or may hereafter

endure. That is wrong—any pain and suffering he has endured, and will hereafter endure, and from all of these matters determine as best you can what sum of money in your best judgment, un-influenced by sympathy or prejudice, will fairly and justly compensate plaintiff for such injury, not exceeding of course the amount asked in the complaint.

Passing to the issue of plaintiff's contributory negligence, as already in effect stated—if the defendant has failed to show by a fair preponderance of the evidence, contributory negligence on the part of the plaintiff, then the plaintiff would be entitled to recover his full damages, unless he had assumed the risk as explained to you.

If, however, the defendant has shown by a fair preponderance of the evidence, negligence on the part [81] of the plaintiff in one or more of the respects which the defendant alleges, and has shown by a fair preponderance of the evidence that such negligence on the part of the plaintiff was a proximate cause of his injury, the plaintiff would not be entitled to recover his full damage for the law is that contributory negligence does not bar recovery but that his damage resulting from injury caused by concurring negligence on the part of himself and employer is diminished in proportion to the negligence attributable to the

employee. If the employee's—servant's negligence is great in comparison to that of the employer, then his right of recovery—the amount he is entitled to recover on account of his injury—is accordingly diminished. If his negligence is slight in comparison with that of his employer, then his right of recovery is slightly diminished.

As an illustration, if you were able to say from the evidence that half of the negligence causing his injury was the servant's, and half of it was the employer's, why, the employee would only be entitled to recover half of his damage. You should not conclude because of this illustration that the Court is in any way indicating an amount that should be allowed. If the plaintiff's negligence contributed to cause the accident to the extent of one-third of the entire negligence, then plaintiff's damages would be reduced by one-third. If to the extent of two-thirds, then his damages would be reduced by two-thirds. But, if as already stated, his, the plaintiff's negligence was alone the sole cause of the accident, then of course that would bar his right to any recovery and your verdict should be in favor of the defendant.

You are in this case as in every case where questions of fact are tried to a jury, the sole and exclusive judges of every question of fact in the case, the weight of the evidence and the credibility of the witnesses.

Among the questions of fact in this case that you are called upon to determine, are:

What was the cause of any injury the plaintiff may have suffered?

Second, did the plaintiff assume the risk of such an injury?

Third, was the defendant guilty of negligence in any of the respects alleged by plaintiff?

Fourth, was that negligence one of the causes —one of the proximate causes of plaintiff's injury? [82]

Fifth, was the plaintiff himself guilty of contributory negligence?

Sixth, what was the nature of the injuries, if any, suffered by plaintiff which were proximately caused by defendant's negligence?

Seventh, what amount would fairly and justly compensate him therefor, and by what amount, if any, should that be reduced because of negligence on the plaintiff's part?

In weighing the evidence and measuring the credibility of the witnesses who have appeared before you and testified, their appearance, conduct, and demeanor in giving their testimony should be taken into account.

Take into account whether a particular witness appeared to you to be doing the best that witness could under the circumstances to fully and truthfully inform you as to those matters concerning which he testified.

Take into account whether a witness or witnesses appeared reluctnat or evasive, or by any conduct on their part led you to believe they were trying to keep from telling you something material to the case, or so distorted and twisted that which they did tell you as to be calculated to mislead you.

Take into account whether or not another witness or witnesses appeared too willing and repeatedly told you, or tried to tell you something about which they had not been asked.

Take into account the situation, in which each witness was placed as enabling that witness to know exactly what happened on a given occasion, as one witness might, because of his familiarity with conditions or relation to the occurrence, or his proximity thereto, be better enabled to observe what took place, to know what the situation was and conditions were, than another witness not having the same advantage or advantages.

Take into account whether the testimony of a witness appears probable in the light of the circumstances, or whether it appears unreasonable and unlikely.

Take into account whether the statements of a witness have at all times been consistent, and if inconsistent in any material matter, whether there has been a reasonable explanation shown for such inconsistency.

Take into account whether the testimony of

a witness has been corroborated where you would expect [83] it to be corroborated if true, or whether it has been contradicted by other evidence in the case.

Take into account the interest that any witness is shown to have in the case, whether it has been shown by the manner of the witness in giving his testimony, or by his relation to the case, those interested in it, or to the matters out of which it arose.

The plaintiff, having taken the stand and testified in his own behalf, you will apply to his testimony the same rules that you do to the testimony of other witnesses, including his natural interest in the result of the case.

Any verdict, in order to be received by the Court must be the unanimous verdict of the jury.

Anything further, gentlemen?''

The foregoing bill of exceptions is herewith lodged with the court and presented as defendant's bill of exceptions in this case.

J. W. QUICK
CHARLES A. HART
FLETCHER ROCKWOOD
CAREY, HART, SPENCER
& McCULLOCH
Attorneys for Defendant. [84]

[Title of Court and Cause.]

CERTIFICATE.

The matter of the settlement of the Bill of Exceptions herein in connection with the appeal of the defendant having been duly continued until this day, the parties having stipulated that with certain amendments the same may be allowed, and the Court being advised and finding the same proper and sufficient, with the exception of certain amendments on the Court's own motion made and embodied therein.

The Court certifies the foregoing, consisting of pages numbered 1 to 65, inclusive, and pages 1-a, includes a statement of all of the material evidence admitted, other than certain of the exhibits, and all material proceedings, rulings and exceptions taking place upon the trial and further certifies that the omitted exhibits were and are identified as Plaintiff's exhibits 1, 2 and 3 and Defendant's exhibits A-1, A-2, A-3 and A-4, of which exhibits Plaintiff's Exhibit 1 and Defendants exhibits A-1, A-2, A-3 and A-4 have, upon stipulation of the parties, been ordered forwarded by the Clerk of this Court to the Circuit Court of Appeals for the Ninth Circuit, the parties stipulating that Plaintiff's exhibits 2 and 3 are not necessary to the consideration of the points of law raised by the exceptions and the Court so finding, the same are ignored and neither are included in the Bill of Exceptions nor ordered transmitted to the Circuit Court of Appeals.

Done at Tacoma this 24th day of December, 1934.

EDWARD E. CUSHMAN
Judge [85]

United States of America
District of Oregon
County of Multnomah.—ss.

Due Service of the within Defendant's Bill of Exceptions is hereby accepted at Portland Oregon, this 13th day of November, 1934, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood of attorneys for Defendant.

WM. P. LORD (Signed)
of Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 24, 1934. [86]

[Title of Court and Cause.]

STIPULATION RELATING TO EXHIBITS.

It is hereby stipulated by and between the parties hereto through their respective attorneys that exhibits offered by the parties and received in evidence at the trial of the above entitled cause in this court, including the following:

Plaintiff's Exhibit 1—model of truck and wheels
Defendant's Exhibit A-1—photograph
Defendant's Exhibit A-2—photograph
Defendant's Exhibit A-3—photograph
Defendant's Exhibit A-4—photograph

which are a part of the record of the above entitled court in this case, shall be forwarded by the clerk of this court to the Circuit Court of Appeals for the Ninth Circuit, and shall be considered as a part of the record upon appeal to said Circuit Court of Appeals without being incorporated in the [87] bill of exceptions, and that an order may be made by the court to give effect to this stipulation.

And it is further stipulated that exhibits offered by plaintiff and received in evidence, consisting of x-ray plates and numbered respectively Plaintiff's Exhibits 2 and 3, shall not be forwarded to said Circuit Court of Appeals and are not necessary in the consideration of the points of law raised by the exceptions set forth in defendant's bill of exceptions.

Dated November 16th, 1934.

WM. P. LORD
HARRY ELLSWORTH FOSTER
Attorneys for Plaintiff.

J. W. QUICK
CHARLES A. HART
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Defendant.

[Endorsed]: Filed Nov 19-1934 [88]

[Title of Court and Cause.]

ORDER RELATING TO EXHIBITS.

Based upon the stipulation of the parties hereto through their respective attorneys, it is hereby

ORDERED that exhibits offered by the parties and received in evidence at the trial of the above entitled case, including the following:

Plaintiff's Exhibit 1—model of truck and wheels
Defendant's Exhibit A-1—photograph
Defendant's Exhibit A-2—photograph
Defendant's Exhibit A-3—photograph
Defendant's Exhibit A-4—photograph

which are a part of the records of this court in this case, shall be forwarded by the clerk of this court to the Circuit Court of Appeals for the Ninth Circuit, and shall be considered as a part of the record upon appeal to said Circuit Court [89] of Appeals, without being incorporated in the bill of exceptions. And it is further

ORDERED that exhibits offered by the plaintiff and received in evidence at the trial of this case, consisting of ex-ray plates, and numbered respectively Plaintiff's Exhibits 2 and 3, shall not be forwarded to said Circuit Court of Appeals and plaintiff's attorneys so stipulating it be found that they are not necessary in the consideration of the points of law raised by the exceptions set forth in defendant's bill of exceptions.

Dated November 19th, 1934.

EDWARD E. CUSHMAN
Judge.

Approved as to form
WM. P. LORD

[Endorsed] : Filed Nov 19 - 1934 [90]

[Title of Court and Cause.]

PETITION FOR APPEAL AND SUPERSEDEAS.

TO THE HONORABLE EDWARD E. CUSHMAN, District Judge, and one of the judges of the above entitled court:

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, the defendant in the above entitled cause, feeling itself aggrieved by the judgment entered herein on the 13th day of November, 1934, in favor of the plaintiff and against defendant in the sum of $15,000, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and the whole thereof for the reasons set forth in the assignment of errors which is served and filed herewith; and said defendant prays that this petition for said appeal may be allowed, and that a transcript of the record and of all proceedings upon which said judgment is based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and defendant further prays that an order may be made fixing the amount of security which defendant shall give and furnish upon the allowance of said appeal, and that upon

the giving of such [91] security, all further proceedings in this cause be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

J. W. QUICK
CHARLES A. HART
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Defendant.

[Endorsed] : Filed Dec 10, 1934 [92]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes defendant and files the following assignment of errors upon which it will rely upon the prosecution of this appeal in the above entitled cause from the judgment entered herein in favor of plaintiff and against the defendant on the 13th day of November, 1934.

I.

The above entitled court erred in denying defendant's motion, made at the opening of the trial of said case and before the statement of counsel and before any evidence was received, to dismiss the action upon the ground that the court had no jurisdiction.

II.

The above entitled court erred in denying defendant's motion, made at the trial after both parties had rested, to dismiss the case upon the ground that the court had no jurisdiction. [93]

III.

The above entitled court erred in overruling defendant's objection to the question propounded to witness W. E. McCARTY, a witness called and sworn on behalf of plaintiff, reading as follows:

> "Q. What was the size and weight of those wheels as compared with the wheels shown in defendant's Exhibits A-1 and A-2?"

IV.

The above entitled court erred in overruling defendant's objection to the question propounded to said witness W. E. McCARTY, reading as follows:

> "Q. And how long was it after that truck was built before they started carrying the wheels shown in the exhibits referred to?"

V.

The above entitled court erred in overruling defendant's objection to the question propounded to witness ROY BUTTNER, a witness called and sworn on behalf of plaintiff, reading as follows:

> "Q. Do you know when the floor in front of the clock where this accident happened was repaired?"

VI.

The above entitled court erred in overruling defendant's objection to the question propounded to witness PRICE BUTTNER, a witness called and sworn on behalf of plaintiff, reading as follows:

> "Q. With reference to the occurrence of this accident, do you know when the floor at that point was repaired?" [94]

VII.

The above entitled court erred in denying defendant's motion made at the close of all the evidence offered and received upon the trial of this action, and before the argument of counsel and the submission of the case to the jury, for an order directing the jury to return a verdict in favor of the defendant upon the ground that the plaintiff failed to sustain the burden of proof to show that any negligence of the defendant alleged in the complaint was the proximate cause of the accident complained of; that the evidence was insufficient to prove that the defendant was negligent in any of the respects charged in the plaintiff's complaint, and that it appeared affirmatively and as a matter of law that the injuries sustained by plaintiff, as alleged in the complaint, were proximately caused by risks of the employment which were assumed by the plaintiff.

VIII.

The above entitled court erred in refusing to give to the jury an instruction requested by defendant

in writing prior to the arguments of counsel to the jury, reading as follows:

> "In his complaint, plaintiff charges that the defendant was negligent in that the method adopted by the defendant's foreman in transporting trailer wheels was not reasonably safe by reason of the condition of the decking or flooring of the roundhouse, and by reason of the sprung condition of the truck upon which the wheels were being moved. I instruct you that the evidence shows that plaintiff, before he began the particular task in which he was engaged at the time of his alleged injury, was aware of the condition of the flooring and was aware of the condition of the truck which caused the truck to stick or stall while being used in the transportation of trailer wheels. Likewise plaintiff knew, or in the exercise of his ordinary powers of observation, should have known of the dangers incident to the condition of the floor and the condition of the truck. Consequently, plaintiff, [95] when he began the task, assumed the risk of dangers arising from the condition of the floor and the condition of the truck. Since plaintiff assumed the risk of the dangers I have mentioned, he cannot recover from the defendant for injuries which he may have sustained on account of the condition of the floor and the condition of the truck. For those reasons, the allegations of negligence with respect to the condition of

the floor and the condition of the truck are withdrawn from your consideration and you cannot base recovery by the plaintiff on those allegations of negligence."

IX.

The above entitled court erred in refusing to give to the jury an instruction requested by defendant in writing prior to the argument of counsel to the jury, reading as follows:

"One of the allegations of negligence set forth in plaintiff's complaint is, briefly, that the defendant's foreman should have directed four men to take crowbars and to place the ends of the crowbars, two at the side of the forward end of the truck and two at the rear of the truck, and should have directed two men to hold the tongue of the truck to guide it, and that the foreman should then have given a signal for all workmen to lift and pry in unison. I instruct you that the evidence discloses that plaintiff was fully aware of the manner in which the work was being done in order to move the truck forward after it had stalled just before the plaintiff was injured, as he alleges. The dangers inherent in the method of work as actually done were as apparent to plaintiff as to the defendant or any of its employees. For that reason it follows that the plaintiff assumed the risk of injuries, if any, which may have resulted from the fact

that the method then adopted was being used. For that reason you cannot base any recovery by plaintiff upon the charge of negligence with respect to the number of men working on the truck at the time of the alleged accident and the charge with respect to the number of crowbars then being used."

X.

The above entitled court erred in refusing to give to the jury an instruction requested by defendant in writing [96] prior to the argument of counsel to the jury, reading as follows:

"The complaint alleges, as one charge of negligence, that the defendant was negligent and careless in maintaining the floor in an uneven and worn-out condition and in using a truck the side of which was sprung, as alleged in the complaint. I instruct you that the dangers inherent in the operation of movement of the trailer wheels by the truck over the floor in its then condition, and with the truck in its then condition, were as apparent to the plaintiff as to the defendant and for that reason plaintiff assumed the risk of injuries resulting from the movement of the truck in its then condition over the floor in its then condition. For that reason you cannot base any recovery by plaintiff on the allegation of negligence with respect to the condition of the floor and the condition of the truck."

XI.

The above entitled court erred in refusing to give to the jury an instruction requested by defendant in writing prior to the argument of counsel to the jury, reading as follows:

> "The complaint alleges that the defendant was negligent in that the foreman, after adopting the method of movement of the truck in the manner alleged in the complaint, should have warned the plaintiff of the dangers of the truck moving forward as alleged in the complaint and should not have directed the plaintiff to work in the position described. I instruct you that the dangers inherent in the performance of the work as was done by the plaintiff after the truck had stopped were obvious to anyone using his ordinary powers of observation. For that reason there was no duty upon the defendant or its foreman to warn plaintiff of such dangers. There is no duty upon a master to warn a servant of dangers of the employment which are open and obvious and which should be discovered by the servant in the exercise of his ordinary powers of observation. Consequently that charge of negligence which I have just referred to is entirely withdrawn from your consideration and you are not permitted to base any recovery by the plaintiff on that charge of negligence." [97]

WHEREFORE defendant prays that said judgment heretofore and on the 13th day of November,

1934, entered in this action against the defendant and in favor of plaintiff, be reversed.

J. W. QUICK
CHARLES A. HART
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Defendant.

[Endorsed] : Filed Dec 10 - 1934 [98]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The above named defendant, Spokane, Portland and Seattle Railway Company, having duly filed herein its petition for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein in favor of plaintiff and against defendant on November 13, 1934, and having duly filed its assignment of errors upon which it will rely upon said appeal,

IT IS ORDERED that an appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment entered in this action in favor of plaintiff and against defendant on November 13, 1934.

IT IS FURTHER ORDERED that the bond on appeal herein be fixed at the sum of $17,000, the same to act as a supersedeas bond and as a bond for costs and damages on appeal.

Dated December 10th, 1934.

EDWARD E. CUSHMAN
District Judge.

[Endorsed] Filed Dec 10 - 1934 [99]

[Title of Court and Cause.]

UNDERTAKING ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation, as principal, and CONTINENTAL CASUALTY COMPANY, a corporation organized and existing under the laws of the state of Indiana, having an office in the state of Washington, and being duly authorized to transact business pursuant to the Act of Congress of August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereunder", as surety, are held and firmly bound unto LEO H. MARTIN in the full and just sum of $17,000, to be paid to said LEO H. MARTIN, his heirs, administrators, executors or assigns, to which payment, well and truly to be made, the undersigned bind themselves, their successors and assigns, jointly and firmly by these presents. Upon condition, nevertheless, that

WHEREAS, the above named Spokane, Portland and Seattle Railway Company has appealed

to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment in favor of [100] the above named plaintiff, LEO H. MARTIN, made and entered on November 13, 1934, in the above entitled action by the District Court of the United States for the Western District of Washington, Southern Division, praying that said judgment may be reversed.

NOW, THEREFORE, the condition of this obligation is such that if the above named appellant shall prosecute this appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make its appeal good, then this obligation shall be void; otherwise the same shall remain in full force and effect.

IN WITNESS WHEREOF, the said principal and the said surety have executed this bond the 10th day of December, 1934.

(Corporation Seal)

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY

By: A. J. WITCHEL,

Secretary

As Principal

(Seal)

CONTINENTAL CASUALTY COMPANY

By: O. A. LYMAN,

Attorney-in-fact

By PARKER H. LYMAN,

Attorney-in-fact

As surety.

The foregoing bond is hereby approved as to form, amount, and sufficiency of surety.

EDWARD E. CUSHMAN
Judge of the United States District Court
for the Western District of Washington,
~~Southern Division.~~

[Endorsed]: Filed Dec 10 - 1934 [101]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please make up the transcript on appeal in the above entitled case, to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, and you will please include in such transcript on appeal the following and no other papers and exhibits, to wit:

1. Complaint
2. Amended answer
3. Reply
4. Verdict
5. Judgment
6. Bill of exceptions
7. Certificate relating to bill of exceptions
8. Stipulation relating to exhibits
9. Order relating to exhibits
10. Petition for appeal and supersedeas
11. Assignment of errors

12. Order allowing appeal
13. Undertaking on appeal
14. Citation on appeal
15. Copy of this praecipe as served upon counsel.

Very respectfully yours,

J. W. QUICK
CHARLES A. HART
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & McCULLOCH
Attorneys for Spokane, Portland and Seattle Railway Company, defendant and appellant.

[Endorsed]: Filed Jan 4 - 1935 [102]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD.

I, Edgar M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing 102 pages of typewritten record consisting of pages numbered from one to one hundred and two, both inclusive, are a full, true and correct copy of so much of the record, papers and proceedings in the case of Leo H. Martin, Plaintiff and Appellee vs Spokane, Portland and Seattle Railway Company, a corporation, defendant and appellant, cause No. 8354, in said Court, as required by praecipe

of counsel filed and of record in my office in said District at Tacoma, and that the same constitutes the record on appeal from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I herewith attach and transmit the original citation in this cause.

I further certify, that under *seperate* cover I am forwarding to said Circuit Court of Appeals the original exhibits numbered as indicated in the stipulation and order relating to original exhibits, as filed in this cause and of record herein.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred and paid by me on behalf of the appellant herein, for making of the appeal record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Appeal fee	$ 5.00
Clerk's fee (Act Feb. 11, 1925) for making record 325 folios @ 15¢ per folio	48.75
Clerk's certificate to transcript of record	.50
Clerk's certificate to original exhibits	.50
Express charges on record to San Francisco Calif.	.60
Total	$55.35

I do further certify that the cost or record on appeal due this office amounting to $55.35 has been paid to me by the appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the City of Tacoma, in the Western District of Washington, this 15th day of January, 1935.

(Seal) EDGAR M. LAKIN, Clerk,
By E. W. PETTIT Deputy. [103]

[Title of Court and Cause.]

CITATION ON APPEAL.

TO LEO H. MARTIN, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof, pursuant to a notice of appeal filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein Spokane, Portland and Seattle Railway Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the judgment in said cause should not be corrected and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand at Tacoma in said district this 10th day of December, in the year of our Lord one thousand nine hundred and thirty-four.

EDWARD E. CUSHMAN
Judge. [104]

United States of America,
District of Oregon
County of Multnomah—ss.

Due service of the within Citation on Appeal is hereby accepted at Portland, Oregon, this 11th day of December, 1934, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood of attorneys for Defendant.

LORD
Of Attorneys for Plaintiff. [105]

[Endorsed]: Transcript of the Record. Filed January 18, 1935. Paul P. O'Brien, U. S. Circuit Court of Appeals for the Ninth Circuit.